(17,358.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 256.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, PETITIONER,

vs.

HEMAN CLARK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Page.
Transcript from the circuit court of the United States for the southern district of New York	1
Writ of error	1
Clerk's certificate and return	2
Transcript from State court	3
Summons	3
Complaint	4
Clerk's certificate	8
Notice of appearance	9
Stipulation as to time to plead	10
Petition for removal	11
Bond for removal	13
Plaintiff's bill of particulars	16
Reply	19
Amended answer	20
Note as to contract	31
Amended complaint	32
Answer to amendments to complaint	37

Page.
Order of reference to Wm. G. Choate, &c. 45
Stipulation for reference to Wm. G. Choate, &c. 46
Order of reference to George Hoadly. 47
Consent to foregoing order. 48
Report of George Hoadly, referee. 49
Defendant's exceptions to report of referee. 98
Defendant's further exceptions to report of referee. 102
Order of recommitting report of referee. 107
Second report of George Hoadly, referee. 109
Findings of fact. 110
Conclusions of law. 117
Further findings of fact. 120
Further conclusions of law. 137
Findings requested by defendant refused. 139
Conclusions requested by defendant refused. 140
Defendant's requests for findings of fact. 145
Contract of March 6, 1886. 147
Defendant's requests for conclusions of law. 212
Note as to exceptions. 220
Judgment, April 6, 1898. 221
Defendant's exceptions to judgment and decision of court. 226
Judgment, April 6, 1898. 229
Bill of exceptions. 230
Statement. 230
Testimony of Wm. W. Hegeman. 234
Plaintiff's Exhibit No. 3—Letter, Hegeman to Kimball, June 3, 1886. 236
No. 4—Letter, Hegeman to Kimball, July 26, 1886. 236
No. 5—Letter, Hegeman to Kimball, February 1, 1887. 237
No. 36—Letter, Hegeman to Carpenter, February 28, 1887. 237
No. 9—Letter, Hegeman to Dunlap, August 31, 1886. 239
No. 10—Letter, Hegeman to Dunlap, September 13, 1886. 239
No. 11—Letter, Hegeman to Whittemore, June 18, 1886. 240
No. 13—Letter, Hegeman to Carpenter, March 23, 1887. 241
No. 14—Telegram, Hegeman to Campbell, November 19, 1886. 242
No. 15—Telegram, Hegeman to Campbell, November 16, 1886. 243
No. 16—Letter, Hegeman to Kimball, March 18, 1887. 243
No. 17—Letter, Hegeman to Kimball, March 24, 1887. 244
No. 24—Letter, Hegeman to Whittemore, March 3, 1890. 246
Letter, Hegeman to Miller, November 10, 1886. 252

Page.

Defendant's Exhibit No. 18—Telegram, Hegeman to Kimball, April 11, 1887. 255
No. 19—Telegram, Hegeman to Kimball, October 3, 1887..... 255
No. 20—Telegram, Hegeman to Kimball, October 7, 1886..... 255
No. 21—Telegram, Hegeman to Kimball, November 13, 1886..... 255
Testimony of Heman Clark..... 273
Wm. W. Hegeman (recalled)..... 276
Dietrick Van Aiken..... 278
Heman Clark (recalled)..... 279
Plaintiff rests..... 280
Amendments to complaint 280
Objections to amendments..... 282
Motion to require plaintiff to elect, &c 282
Motion to strike out testimony..... 282
Motion to dismiss, &c..... 283
Defendant's Exhibit A—Certificate of chief engineer to final estimate, March 3, 1888 286
A—Receipt of Clark, March 9, 1888..... 293
B—Check, Bond to Clark, March 9, 1888..... 296
Testimony of Don J. Whittemore 297
Plaintiff's Exhibit No. 25—Letter, Hegeman to Miller, February 26, 1890..... 308
Testimony of Francis W. Kimball..... 312
Defendant's Exhibit No. 46—Letter, Kimball to Hegeman, July 30, 1886..... 315
No. 54—Letter, Kimball to Hegeman, February 4, 1887..... 317
No. 55—Letter, Hegeman to Kimball, September 22, 1886 318
No. 56—Letter, Kimball to Hegeman, September 30, 1886..... 319
No. 57—Letter, Kimball to Hegeman, February 3, 1887..... 320
Testimony of Roswell Miller..... 323
Defendant's Exhibit No. 59—Telegram, Miller to Hegeman, March 12, 1886 325
No. 60—Letter, Miller to Clark, March 19, 1886..... 326
No. 61—Telegram, Miller to Clark, April 1, 1886..... 327
Plaintiff's Exhibit No. 28—Telegram, Miller to Clark, February 23, 1888 331
Testimony of F. W. Kimball (cross) 331
Plaintiff's Exhibit No. 29—Telegram, Kimball to Hegeman, January 24, 1887 332
No. 30—Letter, Kimball to Hegeman, January 14, 1887. 332
No. 31—Letter, Kimball to Hegeman, February 5, 1887 332

Page.

Plaintiff's Exhibit No. 32—Letter, Kimball to Hegeman, March 11, 1887. 333
No. 33—Letter, Hegeman to Kimball, February 1, 1887 334
No. 38—Letter, Hegeman to Whittemore, July 19, 1886 336
No. 40—Letter, Hegeman to Kimball, June 3, 1886 337
Testimony of Fred. G. Kuehnle 341
D. G. Whittemore (recalled) 345
Defendant rests 346
Testimony of Frank S. Bond 346
Plaintiff's Exhibit No. 46—Voucher of July 25, 1887 347
No. 47—Voucher of September 1, 1887 348
No. 48—Letter, Miller to Bond, Mar. 7, 1888. 349
No. 49—Statement of account, March 3, 1883. 349
Testimony of Wm. W. Hegeman (recalled) 361
Plaintiff's Exhibit No. 51—Statement as to rights of way 374
Testimony of Frederick Russell 377
Frank E. House 386
Heman Clark (recalled) 388
Wm. W. Hegeman (recalled) 407
Heman Clark (recalled) 409
Wm. C. Edwards 410
Frank S. Bond (recalled) 411
F. W. Kimball (recalled) 413
F. A. Delano 418
D. J. Whittemore (recalled) 422
F. W. Kimball (recalled) 424
Lewis T. Moore 425
Roswell Miller (recalled) 427
J. B. Moll 434
D. J. Whittemore (recalled) 437
Jas. M. McKinlay 439
Heman Clark (recalled) 442
Testimony closed 444
Motions to dismiss 445
Statement 447
Defendant's exceptions to findings, &c. 448
Referee's certificate to bill of exceptions 476
Consent to bill of exceptions 476
Assignment of errors 477
Supersedeas bond 504
Citation 508
Stipulation as to printing record 510
Opinion of Lacombe, J 512
Opinion of Wallace, J 536
Clerk's certificate 543
Writ of certiorari 544
Stipulation as to return to certiorari 547
Judgment of United States circuit court of appeals 548
Clerk's certificate and return 550

United States of America, ss.: 1

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Heman Clark, plaintiff, and The Chicago, 2
Milwaukee and St. Paul Railway Company, defendant, a manifest error hath happened, to the great damage of the said Chicago, Milwaukee and St. Paul Railway Company, defendant, as is said and appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit at the City of New 3
York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 19th day of May, 1898, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to

be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 21st day of April, in the year of our Lord one thousand eight hundred and ninety-eight and of the independence of the United States the one hundred and twenty-second.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America, for
[L. S.] the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
U. S. C. J.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 3 to 696, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of The Chicago, Milwaukee and St. Paul Railway Company, plaintiff in error, against Heman Clark, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighteenth day of May, in the year of our Lord one thousand eight hundred

and ninety-eight, and of the independence of the United States the one hundred and twenty-second. 7

JOHN A. SHIELDS,
[SEAL.] Clerk.

(Endorsed)—The U. S. Circuit Court of Appeals for the Second Circuit.—The Chicago, Milwaukee and St. Paul Railway Company, Plaintiff in Error, *vs.* Heman Clark, Defendant in Error.—Original Writ of Error.—Bangs, Stetson, Tracy & MacVeagh, Attorneys for Plaintiff in Error, 15 Broad St., N. Y.—A copy of the within paper has been this day received at the office of Kellogg, Rose & Smith, 120 Broadway, N. Y., Attorneys for Defendant in Error, Apr. 21, 1898.—U. S. Circuit Court.—Apr. 25, 1898.— John A. Shields, Clerk. 8

SUPREME COURT

OF THE STATE OF NEW YORK.

HEMAN CLARK,
Plaintiff,

AGAINST

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Defendant.

Summons. 9

Trial desired to be had in New York County.

TO THE ABOVE NAMED DEFENDANTS:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to ap-

pear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated N. Y., Aug. 5, 1893.

KELLOGG, ROSE & SMITH,
Plaintiff's Attorneys.
Office and Post Office address,
No. 120 Broadway,
N. Y. City.

NEW YORK SUPREME COURT,

CITY AND COUNTY OF NEW YORK.

HEMAN CLARK

AGAINST

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

The complaint of the plaintiff respectfully shows to this Court:

FOR A FIRST CAUSE OF ACTION.

1. That the defendant is a foreign corporation duly organized under the laws of the State of Wisconsin.

2. That heretofore and on the 6th day of March, 1886, the plaintiff made and entered into a contract wherein and whereby for certain considerations therein named the plaintiff agreed to construct, build and fully complete ready for the rolling stock thereon a line of railroad extending from a point in the City of Ottumwa, Iowa, to Harlem Station, in

Clay County, Missouri, a total distance of two hundred and two eight-tenths ($202\frac{8}{10}$) miles, in accordance in all respects with certain plans, profiles and specifications made by the Chief Engineer of the defendant and under the supervision and direction and to the satisfaction of said Chief Engineer, as in said contract will more fully and with greater detail appear. 13

3. That it was further provided in said agreement that the defendant should pay to the plaintiff for the said work provided to be done and performed under said contract, three million, nine hundred and fifty-four thousand six hundred dollars, the said amount to be in full satisfaction for building, constructing and fully completing the said railroad in strict conformity to the stipulations, specifications, and requirements referred to in said contract, subject however to the right of deductions of fifty thousand dollars to be deducted by the defendant for transportation as provided in said agreement. 14

4. That immediately after the execution of said agreement the plaintiff proceeded to execute and perform said contract and has fully completed and performed the same so far as permitted by the said defendant and excepting such portions as were not required by the defendant to be done under the said contract but were assumed by defendant. 15

5. That the said work so done and performed has been accepted by the defendant and the Chief Engineer of the said defendant who has certified to the proper performance of the said work and furnishing the materials under the said contract in accordance therewith and to his satisfaction.

6. That the total amount earned under the said contract after deducting from the said contract price for work not done and adding thereto certain allowances and rebates as agreed upon between the par-

16 ties to this action was three million, nine hundred and thirty thousand three hundred and and ninety-seven $\frac{69}{100}$ dollars.

7. That there has been paid on account of said contract the sum of three million, eight hundred and fifty-nine thousand three hundred and forty $\frac{6}{100}$ dollars.

8. That the balance thereof, to wit, seventy-one thousand and fifty-seven $\frac{63}{100}$ dollars, though duly demanded has never been paid.

FOR A SECOND CAUSE OF ACTION.

17

1. The plaintiff reavers all those allegations in the complaint stated and and contained in paragraphs numbered I. to V. and begs leave to refer to the same and make them a part of this cause of action without repetition.

2. That while the plaintiff was engaged in the proper performance of his work under said contract and in the execution and completion of the same, he was required by the Chief Engineer of the defendant to perform and did so perform as required, and at the special instance and request of the defendant, large quantities of work in excess of that called for
18 by the said contract, and at like request and by like requirements to furnish material and erect structures more in number and of a more expensive design than that called for in the plans and specifications under said contract, at a largely increased cost to the plaintiff, above that called for in the contract.

3. That the said work done and materials furnished were fairly and reasonably worth the sum of two hundred and thirty-two thousand, seven hundred and five $\frac{66}{100}$ dollars.

That though duly demanded no part of said sum has been paid.

FOR A THIRD CAUSE OF ACTION. 19

1. The plaintiff reavers all the allegations in the complaint stated and contained in paragraphs numbered I. to V., and begs leave to refer to the same and make them a part of this cause of action without repetition.

2. That it was provided in said contract aforesaid that the defendant should furnish all right of way.

3. That the plaintiff failed at times to procure the right of way, as provided in said contract, and particularly neglected to procure the same in time for 20
the proper performance of said work under said contract in the months of September and October, 1887.

4. That by reason of said failure to procure said right of way as aforesaid, plaintiff was put to great loss, damage and expense in removing ties and rails, other track material, bridge timber, and in the performance of the said work in the sum of two thousand one hundred and ninety-six dollars.

5. That though duly demanded, no part of said sum has been paid.

21

Wherefore the plaintiff demands judgment against the defendant for the sum of three hundred and five thousand nine hundred and fifty-nine $\frac{20}{100}$ dollars, with interest thereon from the day of , together with the costs and disbursements of this action.

KELLOGG, ROSE & SMITH,
Attorneys for Plaintiff,
120 Broadway,
New York City.

22 City and County of New York, ss.:

HEMAN CLARK, being duly sworn, says: That he is the plaintiff in this action. That he has read the foregoing complaint, and that the same is true to his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

HEMAN CLARK.

Sworn to before me, this 5th day of Aug., 1893.

HAMPTON D. EWING,
Notary Public,
West. Co.
23 Certif. filed in N. Y. Co.

STATE OF NEW YORK, City and County of New York, } ss.:

I, HENRY D. PURROY, Clerk of the said City and County and Clerk of the Supreme Court of said State for said County, do certify that I have compared the preceding with the original Record, on Removal to U. S. Court, Heman Clark *vs.* Chicago, Milwaukee and St. Paul Railway Company, on file in my office, and that the same is correct transcript therefrom and the whole of such original.

In witness whereof, I have hereunto subscribed
24 my name and affixed my official seal, this 21st day of September, 1893.

HENRY D. PURROY,
[SEAL.] Clerk.

NEW YORK SUPREME COURT, 25

CITY AND COUNTY OF NEW YORK.

HEMAN CLARK,
Plaintiff,

AGAINST

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Defendant.

Notice of Appearance.

26

Gentlemen,—Please to take notice that the defendant appears in this action, and that we are retained as attorneys for said defendant therein, and demand that a copy of the complaint and all papers in this action be served on us at our office, No. 15 Broad street, New York City.

Dated New York, September 1, 1893.

Yours, &c.,
BANGS, STETSON, TRACY & MACVEAGH,
Attorneys for Defendant.

To Messrs. KELLOGG, ROSE & SMITH,
Attorneys for Plaintiff,
120 Broadway,
New York City. 27

A copy of the within paper has been this day received at the office of Kellogg, Rose & Smith, September 1, 1893.

KELLOGG, ROSE & SMITH,
120 Broadway,
N. Y.

28 NEW YORK SUPREME COURT,

CITY AND COUNTY OF NEW YORK.

HEMAN CLARK AGAINST THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY CO.	Stipulation Extending Time to Answer, &c.

29

It is hereby stipulated that the time for the defendant to answer, demur or to make any motion with relation to the complaint in this action, may be and hereby is extended to and including the 26th day of September, 1893, the issue in said action to date as if no extension had been granted.

Dated September 1, 1893.

KELLOGG, ROSE & SMITH,
Attorneys for Plaintiff.

(Endorsed)—N. Y. Supreme Court.—Heman Clark against The Chicago, Mil. and St. P. Railway Co. —Stipulation Extending Time to Answer, &c.

30

NEW YORK SUPREME COURT, 31

CITY AND COUNTY OF NEW YORK.

HEMAN CLARK,
Plaintiff,

AGAINST

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Defendant.

32

TO THE SUPREME COURT OF THE STATE OF NEW YORK, HELD IN AND FOR THE CITY AND COUNTY OF NEW YORK:

Your petitioner, the defendant in the above entitled action, respectfully shows to this Court, upon information and belief, as follows:

FIRST.—That the matter and amount in dispute in the above entitled suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars ($2,000).

SECOND.—That the controversy in said suit is between citizens of different States, and that your 33
petitioner, the said defendant, was at the time of the commencement of the suit, and still is, a foreign corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and a resident and citizen of the said State of Wisconsin and a non-resident of the State of New York, and that the plaintiff above named, Heman Clark, was then and still is a resident and citizen of the City, County and State of New York.

THIRD.—Your petitioner offers herewith a good and sufficient surety for his entering in the Circuit

Court of the United States for the Southern District of New York, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

FOURTH.—The time fixed by law and by the rules of the court for your petitioner to answer in said suit has not expired, and your petitioner has not yet answered therein.

Wherefore, your petitioner prays this Court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond, and to cause the record herein to be removed to said Circuit Court of the United States in and for the Southern District of New York, and for such other and further relief as may be proper.

CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY,
Petitioner.

BANGS, STETSON, TRACY & MACVEAGH,
Attorneys for Petitioner,
15 Broad Street,
New York City.

City and County of New York, ss.:

CHARLES MACVEAGH, being duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above entitled action; that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the grounds of deponent's belief as to all matters not stated upon his knowledge are the sworn statements of the plaintiff and statements contained in letters from the general counsel for the defendant. That the reason why

this verification is not made by the defendant is that 37
the defendant is a foreign corporation.

CHARLES MACVEAGH.

Sworn to before me this 5th
day of September, 1893.

WM. S. BAINTON,
Notary Public,
N. Y. Co.

KNOW ALL MEN BY THESE PRESENTS that the Chicago, Milwaukee & St. Paul Railway Company, as principal, and the American Surety Company of the State of New York, as surety, are holden and 38
firmly bound unto Heman Clark in the penal sum of Two hundred and fifty dollars ($250.) lawful money of the United States, to be paid to the said Heman Clark, his executors, administrators or assigns, for which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this 5th day of September, 1893.

UPON CONDITION, NEVERTHELESS, that

WHEREAS, the Chicago, Milwaukee & St. Paul Railway Company has petitioned the Supreme 39
Court of the State of New York, held in and for the City and County of New York, for the removal of a certain cause therein pending, wherein the said Heman Clark is plaintiff and the said Chicago, Milwaukee & St. Paul Railway Company is defendant, to the Circuit Court of the United States in and for the Southern District of New York.

Now, if the said Chicago, Milwaukee & St. Paul Railway Company shall enter or cause to be entered in the said Circuit Court of the United States on the first day of its next session a copy of the rec-

ord in said suit and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY. [L. S.]
By CHARLES MACVEAGH,
Attorney.

Sealed and delivered in the presence of
WM. S. BAINTON.

As to Am. S. Co.
HOWARD ALLISON.

AMERICAN SURETY COMPANY OF NEW YORK.
[L. S.] By H. D. LYMAN,
Vice-President.
CORTLANDT S. VAN RENSSELAER,
Attorney.

State, City and County of New York, ss.:

On this 6th day of September, 1893, before me personally appeared H. D. Lyman, vice-president of the American Surety Company of New York, with whom I am personally acquainted, who, being by me duly sworn, said: That he resided in the City of New York; that he is the vice-president of the American Surety Company of New York ; that he knew the corporate seal of said Company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the Board of Trustees of said Company, and that he signed said instrument as vice-president of said Company by like authority, and that the liabilities of said Company do not exceed its assets, as ascertained in

the manner provided in Section 3, Chapter 486, of 43
the New York Session Laws of 1881. And the said H. D. Lyman further said that he was acquainted with Cortlandt S. Van Rennselaer, and knew him to be one of the attorneys of said Company; that the signature of said Cortlandt S. Van Rensselear subscribed to the said instrument is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him, the said H. D. Lyman, vice-president.

GEO. L. HOLMES,
Notary Public (No. 72).
[L. S.] New York County.
Certificate filed in Kings Co. 44

At a meeting of the Board of Trustees of the American Surety Company of New York, held at the office of the Company, on the 20th day of January, 1892, on motion, it was

"Resolved, That in pursuance of Chapter 416, "Laws of 1886, amending Section eight hundred "and eleven of the Code of Civil Procedure, the "President, Vice-President and Second Vice-Presi- "dent, and each of them, be, and they are hereby, "authorized and empowered to sign, execute and "deliver any and all bonds or undertakings, for or "on behalf of the Company, and to attach thereto "the Seal of the Company, the same to be attested 45
"by the Secretary, or one of the Assistant Secre- "taries, or by one of the Attorneys."

City and County of New York, ss.:

I, CORTLANDT S. VAN RENSSELAER, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and

46 true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company, at the City of New York, this 6th day of September, 1893.

CORTLANDT S. VAN RENSSELAER,
[L. S.] Attorney.

(Endorsed)—N. Y. Supreme Court.—Heman Clark *vs.* The Chicago, Milwaukee & St. Paul Railway Company.—Record on Removal to the U. S. Circuit Court.—Bangs, Stetson, Tracy & MacVeagh, Attorneys for Defendants, 15 Broad Street, New York City, New York.—U. S. Circuit Court.—Filed Sep. 21, 1893.—John A.
47 Shields, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HEMAN CLARK

AGAINST

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.
48

Plaintiff's Bill of Particulars.

FIRST CAUSE OF ACTION.

Amount earned under the contract, as certified by Engineer	$3,930,397 69
Amount paid	9,859,340 06
Balance	$71,057 63

SECOND CAUSE OF ACTION.

385,000 cubic yards of embankment, at .23½	$89,833 33½	
This was extra embankment from that shown on the plans and was filling required in excess of that called for by the contract.		
28,855 cubic yards embankment in excess of cross sections on King & Wetherill *vs.* The C. M. and St. P. Ry. and Heman Clark, at .23	6,636 65	
877 lineal feet Howe truss bridge built in excess of those shown in schedule of quantities	16,400 00	
Other quantities in excess of those shown on schedule, as follows, viz.,		50
18,486 cu. yds. solid rock, $1.20	22,183 20	
90,133 cu. yds. solid rock, 50c.	45,066 50	
963,589 ft. Bm. Culvert timber, 25c.	24,089 73	
31,652 lin. ft. piling $.34	10,761 68	
291,840 ft. Bm. oak bridge ties $35	10,214 40	
False work for 877 lin. ft. Howe truss bridges $4.00	3,508 00	
97,000 ft. Bm. bridge timber taken and used by Company during washout south of Chillicothe, about June, 1888, at $.25	2,425 00	
16 section houses	1,600 00	
	$232,718 49	51

THIRD CAUSE OF ACTION.

Freight charge on ties and rails and other track material and bridge timber shipped from Lawrence, Mo., to Minnaville and other points near Kansas City during September, October and November, 1887, to lay track and complete bridging south of crossing of Hannibal & St. Joseph R. R. near Minnaville, in consequence of failure of Railway Company to secure right of way until about October 20, 1887	$2,196 00

52 SIR,—You will please take notice that the foregoing is a true Bill of Particulars of the plaintiff's claim in the above-entitled action.

Dated New York, November 14, 1893.

Yours, etc.,

KELLOGG, ROSE & SMITH,
Attys. for Plaintiff,
120 Broadway,
New York.

To BANGS, STETSON, TRACY & MACVEAGH, Esqs.,
Defendant's Attorneys.

53 City and County of New York, ss:

HEMAN CLARK, being duly sworn, says: That he is the plaintiff in this action. That he has read the foregoing Bill of Particulars, and that the same is true to his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

HEMAN CLARK.

Sworn to before me this 14th day of November, 1893.

PHILIP M. BRETT,
[SEAL.] Notary Public (No. 160),
New York County.

54 (Endorsed)—U. S. Circuit Court, Southern District of New York.—Heman Clark against The Chicago, Milwaukee and St. Paul Railway Company.—Bill of Particulars.—Kellogg, Rose & Smith, Attys. for Plff., 120 Broadway, New York.—U. S. Circuit Court.—Filed Nov. 14, 1893.—John A. Shields, Clerk.

U. S. CIRCUIT COURT. 55

SOUTHERN DISTRICT OF NEW YORK.

HEMAN CLARK

AGAINST

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

The above named plaintiff, replying to so much 56
of the answer of the defendant herein as constitutes a set-off or counterclaim herein, respectfully shows to this Court:

FIRST.—He denies each and every allegation in fourth set-off or counterclaim or defense stated and contained in paragraphs I., II. and III.

He admits that there was paid to plaintiff on or about March 9, 1888, the sum of one hundred and seventy-three thousand five hundred and thirty two-$\frac{49}{100}$ dollars.

He denies each and every allegation in that portion of the answer stated as a counterclaim or off-set not hereinbefore specifically admitted, controverted or denied. 57

SECOND.—He denies each and every allegation in that portion of the answer of the defendant stated and contained in paragraph fifth as a counterclaim and set-off.

Wherefore, the plaintiff demands judgment as prayed for in the complaint.

KELLOGG, ROSE & SMITH,
Attorneys for the Plaintiff,
120 Broadway,
N. Y. City.

58 City and County of New York, ss.:

HEMAN CLARK, being duly sworn, says: That he is the plaintiff in this action; that he has read the foregoing reply, and that the same is true to his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

HEMAN CLARK.

Sworn to before me this 14th day of November, 1893.

PHILIP M. BRETT,
[SEAL.] Notary Public (No. 160),
New York County.

59

(Endorsed)—U. S. Circuit Court, Southern Dist. of New York.—Heman Clark against The Chicago, Milwaukee and St. Paul R'y Co.—Reply.—Kellogg, Rose & Smith, Atty's for Plff., 120 Broadway, New York.—U. S. Circuit Court.—Filed Nov. 14, 1893.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

60

HEMAN CLARK

AGAINST

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

The above named defendant, for this, its amended answer to the complaint of the plaintiff in the above entitled action, shows to the Court as follows:

FIRST. 61

For answer to the first cause of action alleged in the complaint:

1. It admits that the defendant is a foreign corporation, duly organized under the laws of the State of Wisconsin and of other States.

2. It admits that on or about the 6th day of March, 1886, the plaintiff and the defendant made and entered into a contract dated on that day, which was in writing, whereby the plaintiff agreed to furnish all the material for, and also to execute, construct and finish in every respect, in the most substantial and workmanlike manner, all the work 62
specified in said contract and required by said defendant Railway Company to be done in the construction and completion of the said defendant Railway Company's line of railroad, extending from a point in the City of Ottumwa, Iowa, to Harlem Station, in Clay County, Missouri, a total distance of 202.8 miles, upon the conditions, covenants and agreements and in the manner required, and specified in and by said contract or agreement, of which a copy is hereto annexed, marked "A"; and except as therein stated, the defendant denies that it, at or about the time mentioned in the complaint, entered into any contract with the plaintiff.

63

3. The defendant further admits that shortly after the execution of the said contract or agreement, the plaintiff commenced to execute and perform the same; but it denies that the plaintiff has fully completed and performed the said contract so far as permitted by the defendant, or such portions as were not required by the defendant to be done under said contract or assumed by the defendant, except as hereinafter stated.

4. The defendant admits that the work done and performed by the defendant, so far as it was done

64 and completed, has been accepted by the defendant, and it admits that the chief engineer of the defendant has certified that the said railroad agreed to be built in and by said contract has been by said plaintiff constructed, built, completed and finished in all respects in full conformity with the agreements in said contract, except as the said defendant Railway Company has by agreement with said plaintiff Clark assumed the construction and completion thereof.

5. The defendant denies that the total amount earned under the said contract, after deducting from the contract price named in the said contract
65 for work not done, and adding thereto certain allowances and rebates as agreed upon between the parties to this action, was or is the sum of $3,930,397.69; and it denies that there has been paid to the plaintiff, on account of said contract, no more than the sum of $3,859,340.06, or that a balance of $71,057.63 is still due thereon, or has never been paid.

6. The plaintiff, further answering the said first alleged cause of action contained in the complaint, alleges that in and by the said contract or agreement hereinbefore referred to, it was provided that whenever the chief engineer of the defendant Railway Company should furnish to it his certificate that all
66 the stipulations and covenants in the said agreement contained, to be by the said plaintiff kept and performed, have been by said plaintiff well and truly observed and carried out, and that the said Railway Company's railroad therein proposed and agreed to be built has been by said plaintiff constructed, built, completed and finished in all respects in full conformity with the covenants and agreements in the said contract and agreement in that behalf made by said plaintiff, and should with said certificate also present his (the chief engineer's) estimate of the amount and value of the various kinds of work done by said plaintiff under the terms of the said agree-

ment, which said estimate it was provided and 67
agreed should be final and conclusive between the parties to the said agreement, then the said Railroad Company should and would pay to the said plaintiff the sum or sums, if any, shown by said final estimate to be due to said plaintiff under the terms of the said agreement provided that the entire amount of compensation so to be paid to the said plaintiff should not exceed the sum of $3,954,600.

7. And the defendant alleges that on or about the 3d day of March, 1888, the chief-engineer of the defendant Railway Company did furnish to it his certificate, together with his final estimate, of the amount and value of the work done and materials 68
used by the plaintiff in building the Kansas City line of the defendant Railway Company from Ottumwa, Iowa, to the Missouri River bridge abutment at Randolph Bluffs, Missouri, under the said contract dated March 6, 1886, including all extra work done by said Clark; and that the said railroad agreed to be built in and by said contract had been by said Heman Clark constructed, built, completed and finished in all respects in full conformity with the agreements in said contract, except as the said defendant Railway Company had, by agreement with the said Clark, assumed the construction and completion thereof, and the compensation therefor agreed upon had been deducted in such estimates from the 69
amount which would have been due and owing said Clark had he completed all of said work.

In and by said certificate, the said chief engineer of the defendant Railway Company certified that the total amount and value of the work done and material used by said plaintiff Clark in building the said Kansas City line from Ottumwa, Iowa, to the Missouri River bridge at Randolph Bluffs, as stated in the said certificate, including all extra work done by said Clark, was the sum of $3,895,798.79.

And the defendant further alleges that in and by the said contract and agreement, by Section 2 of Ar-

70 ticle 9 and Section 4 of Article 13 thereof, the said plaintiff agreed to pay to the defendant the sum of $50,000 for the defendant's services in transporting upon and over the railroad covered by the said agreement all teams, tools, machinery, implements, supplies and merchandise and all the material to be used by the plaintiff in and about the construction of the said railroad, and for the use by the plaintiff of the defendant's locomotives and cars in laying the track of said railroad as specified in said agreement; and the said plaintiff agreed to allow to the defendant, to be deducted from the contract price, the further sum of $40,000 by way of forfeiture or damages, in case the said railway agreed in and by
71 the said contract to be built was not completed by the first day of June, 1887; and the defendant alleges that the said railroad was not completed either by the first day of June, 1887, or by the first day of August, 1887, as provided in and by the said contract and agreement.

And the defendant further alleges that it has paid to or for the plaintiff, or on his account, under the said contract, in money, material, labor and transportation, as authorized and provided for in and by the said contract, a sum in excess of any and all amounts which became due or were earned by the plaintiff under said contract, or which had been certified to or allowed by the Chief Engineer of the
72 defendant Railway Company, including all extra work performed or material furnished by the plaintiff under said contract; or in addition thereto.

SECOND.

The defendant Railway Company, further answering the complaint herein, and the second cause of action therein stated, repeats and reavers each and all of the denials and allegations hereinbefore stated and alleged, and it denies that while the plaintiff was engaged in the proper performance of his work under said contract, or in the

execution and completion of the same, he was required by the Chief Engineer of the defendant to perform, or did perform as so required, at the special instance and request of the defendant, large or any quantities of work in excess of that called for by said contract, except or otherwise than as stated in the said Chief Engineer's certificate and final estimate hereinbefore referred to; or that, at the like request or by like requirement, the plaintiff furnished material or erected structures more in quantity or number, or of a more expensive design, than that called for in the plans and specifications under said contract at a largely increased cost to the plaintiff above that called for in the contract, except or otherwise than as stated and certified to, in and by the said certificate and final estimate of the said Chief Engineer of the defendant Railway Company hereinbefore referred to, which included all extra work done by the plaintiff in the performance of the said contract. 73 74

And the defendant denies that any alleged work done or materials furnished by the plaintiff in excess of that called for by the contract, or structures erected more in number, or of a more expensive design, than that called for by the plans and specifications under said contract, were or are reasonably worth the sum of $232,705.68, or any other sum in excess of that allowed for, and with which the plaintiff was given credit in the said certificate and final estimate of the said Chief Engineer of the defendant. 75

And the defendant further alleges that in and by the said contract and agreement it was provided that if the plaintiff was required to furnish any material, or to do any work not required by said contract, and agreed to be furnished or performed by said plaintiff, or should be required by said Chief Engineer to furnish and erect any structure of a design or plan more expensive than that called for by the standard plans of the defendant, and agreed by said plaintiff to be furnished and erected, such

76 requirement should be made in writing by the Chief Engineer of the defendant, and that the plaintiff should be entitled to receive from the defendant such just and reasonable compensation for such material or work, or for such more expensive structure so required by him, as the said Chief Engineer should fix and determine; and the defendant alleges that the Chief Engineer of the defendant has fixed and determined the compensation for any material or work, or for any more expensive structure, which the plaintiff was required by said Chief Engineer to furnish or perform or erect, and that the compensation therefor is included in the said final estimate and certificate of the Chief Engineer
77 of the defendant hereinbefore referred to.

THIRD.

For answer to the third alleged cause of action stated in the complaint, the defendant re-avers and repeats all the denials and allegations hereinbefore stated, and the defendant admits that in and by the said contract and agreement it was provided that the defendant should furnish, at its own cost and expense, and at such time or times as not to delay the execution of the work in the said agreement mentioned and referred to, all the lands which are or might be marked out and
78 designated by the defendant's Chief-Engineer for right-of-way, as the said lands might be required for the construction of the railroad covered by the said agreement; and it denies that the defendant at any time failed to procure the right-of-way for the construction of the said railroad as the same might be required for the construction of the said railroad, or that it particularly neglected to procure the same for the proper performance of said work under said contract in the months of September or October, 1887; and the defendant denies that by reason of any alleged failure to procure said right-of-way, as alleged in the complaint, the plaintiff was put to great or

any loss, damage or expense in removing ties and 79
rails or other track material or bridge timber, or in the performance of said work, in the sum of $2,196 or any other sum.

FOURTH.

The defendant, further answering the said complaint of the plaintiff, and the whole thereof, and each and every of the causes of action therein contained, and as a further and separate defense, and by way of counterclaim, alleges as follows:

That on or about the 12th day of July, 1887, a further and supplemental contract or agreement was made by and between the plaintiff and the defend- 80
ant, whereby the defendant undertook and agreed to finish and complete a portion of the line of railroad and of the work agreed to be done in the construction thereof by the said contract of the plaintiff, dated March 6, 1886, at a price or prices, and upon a consideration named therein, which the defendant Railway Company agreed to pay; and that on or about the 3d of March, 1888, this said Chief-Engineer of the defendant Railway Company made his final estimate and certificate of the amount and value of the work done and materials used by the plaintiff in building the Kansas City line from Ottumwa, Iowa, to the Missouri River bridge abutment at Randolph Bluffs, Missouri, to which point 81
the terminus of the said line had been changed from Harlem Station, Missouri, as provided by the said contract or agreement of March 6, 1886, including all extra work done by said Clark, in and by which certificate and estimate the said Engineer certified that the said plaintiff, Clark, had earned for the construction of the said railroad, under and pursuant to the said contract, including all extra work done by said Clark, the sum of $3,895,798.79; and thereupon, and on or about the 9th day of March, 1888, an account was stated and agreed to by and between the plaintiff and the defendant Railway Company, whereby

82 the amount of the compensation due to the said plaintiff, Clark, for all the work done and material furnished by him under the said contract of March 6, 1886, for the construction of the railroad of the defendant from Ottumwa, Iowa, to the Missouri River, including all extra work performed and material furnished of every kind and description, less deductions made for work not done and work assumed by the defendant Company, was agreed upon and fixed and adjusted at the sum of $3,895,798.79; and it was also agreed that the said Clark should be credited with the further sum of $34,598.90 for materirls sold by him to the said Company and certain rebates and other matters of that description, making in all the
83 sum of $3,930,397.69.

And it was further agreed and fixed and adjusted that the said defendant Railroad Company had paid to said Clark, to apply on said contract, in money, material, labor and transportation, the sum of $3,626,865.20; and that by the terms of Section 4, of Article 13, of the said contract and agreement before mentioned, said Clark was to be charged in addition, for transportation, the sum of $50,000; and that by a supplemental contract between the plaintiff and the defendant, said Clark was also to allow to the defendant Railway Company, by way of forfeitute, in case said railroad was not completed by the first day of June, 1887, the further sum of $40,000, making
84 the amount paid on said contract, together with the allowance of said transportation and the allowance of said forfeiture, the sum of $3,716,865.20, and that the amount then due to said Clark on said contract was the sum of $213,532.49.

And it was further agreed by and between the said plaintiff, Clark, and the defendant, that whereas in and by said contract hereinbefore referred to, it was provided that the said plaintiff, Clark, should save the said defendant Railway Company free and harmless from all claims that might be made against said defendant Railway Company for liens of workmen and claims of sub-contractors, and from all

damages arising from not keeping sufficient fences 85
to preserve crops and restrain cattle, and from all damages for cattle or other domestic animals killed and injured, and from all damages suffered by said sub-contractors and employees while engaged upon said work, for which class of liabilities claims for about $40,000 in amount had been made upon and were then pending in courts by divers claimants against said Railway Company, and that the sum of $40,000 of the amount then found due under said contract to said plaintiff, Clark, had been reserved and set aside by the Railway Company as indemnity or security for the payment of said claims, and of such other claims of the same class as might thereafter be made in case said claimants or any of them 86
should recover judgments against said Railway Company; and that the balance of said $40,000, after paying and settling such claims as might be established against said Railway Company, should be paid over to said plaintiff, Clark, as soon as said claims were satisfied or said defendant Railway Company should be indemnified from any loss on account of the same, deducting which sum of $40,000 from the stated balance of $213,535.49 then found to be due to the said Clark, left as then due and owing by said Railway Company to the said plaintiff, Clark, under said contract the sum of $173,532.49.

That thereupon, and on the said 9th day of March, 87
1888, the said defendant Railway Company duly paid to the said Heman Clark the said sum of $173,532.49, and the said plaintiff, Clark, thereupon acknowledged in writing that he had received from the said defendant Railway Company the said sum of $173,532.49, in full satisfaction of the amount due to him on said estimates of said Chief Engineer of the defendant Railway Company, and in full satisfaction of all claims and demands of every kind, name and nature, arising from or growing out of said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of the

88 said Railway Company to account for such sum of $40,000, as provided in and by the said receipt and acknowledgment of the said plaintiff, Clark.

And the defendant alleges that it has duly paid out and applied to and for the purposes specified in the said receipt and agreement the said sum of $40,000 so reserved, and an amount in excess thereof over and above all other sums received by or for account of the plaintiff, or with which he was entitled to be credited, the sum of five hundred twenty-one $\frac{75}{100}$ dollars ($521.75), for which sum the defendant demands judgment as a counterclaim against the said plaintiff.

BANGS, STETSON, TRACY & MACVEAGH,
89 Attorneys for Defendant, Chicago, Milwaukee and St. Paul Railway Company.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss.:

FRANK S. BOND, being duly sworn, deposes and says: That he is the vice-president of the Chicago, Milwaukee and St. Paul Railway Company, the defendant in the above entitled action; that he has read the foregoing amended answer of the said defendant Railroad Company to the complaint in the said action; that the said answer is true to his own
90 knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true; and that the matters and things contained and set forth in said answer so far as they relate to his own acts and deeds are true, and so far as they relate to the acts and deeds of other persons he believes them to be strictly true.

Deponent further says, that this verification is made by him because said defendant Railway Company is a corporation, and that the grounds of his information and belief in respect of the matters alleged in said answer are the possession by him

of the contract documents and other papers mentioned and referred to in said answer and vouchers, memoranda and information furnished to deponent by other officers of said defendant Railway Company. 91

FRANK S. BOND.

Sworn to before me this day of January, 1896.

JOS. J. MCCANN,
Notary Public,
N. Y. County.

(Endorsed)—U. S. Circuit Court, Southern District of New York.—Heman Clark *vs.* Chicago, Milwaukee & St. Paul Railway Company.—Amended Answer.—Bangs, Stetson, Tracy & MacVeagh, Attorneys for Deft., 15 Broad Street, New York City, New York.—U. S. Circuit Court.—Filed Mar. 21, 1898.—John A. Shields, Clerk. 92

NOTE.

"The copy of the contract mentioned and referred to in the within answer, and attached thereto, is the same as the copy attached to the fourth finding of fact, made or given by George Hoadly, Esq., the Referee in this action, upon the defendant's (plaintiff in error) request, as contained in the report of said Referee, filed February 8, 1898" (pp. 220-259 of original transcript of record, p. 147 of same as printed). 93

See stipulation of counsel at end of record.

94 **Amended Complaint.**

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HEMAN CLARK

AGAINST

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

95

The amended complaint of the plaintiff respectfully shows to this Court:

FOR A FIRST CAUSE OF ACTION.

1. That the defendant is a foreign corporation duly organized under the laws of the State of Wisconsin.

2. That heretofore, and on the 6th day of March, 1886, the plaintiff made and entered into a contract wherein and whereby, for certain considerations therein named, the plaintiff agreed to construct, build and fully complete, ready for the rolling stock
96 thereon, a line of railroad extending from a point in the City of Ottumwa, Iowa, to Harlem Station, in Clay County, Missouri, a total distance of two hundred and two eight-tenths (202 8/10) miles, in accordance in all respects with certain plans, profiles and specifications made by the Chief Engineer of the defendant and under the supervision and direction and to the satisfaction of said Chief Engineer as in said contract will more fully and with great detail appear.

3. That it was further provided in said agreement that the defendant should pay to the plaintiff for

the said work provided to be done and performed under said contract three million nine hundred and fifty-four thousand six hundred dollars, the said amount to be in full satisfation for building, constructing and fully completing the said railroad in strict conformity to the stipulations, specifications and requirements referred to in said contract, subject, however, to the right of deductions of fifty thousand dollars to be deducted by the defendant for transportation as provided in said agreement. 97

4. That immediately after the execution of said agreement the plaintiff proceeded to execute and perform said contract and has fully completed and performed the same so far as permitted by the said defendant and excepting such portions as were not required by the defendant to be done under the said contract, but were assumed by defendant. 98

5. That the said work so done and performed has been accepted by the defendant and the Chief Engineer of the said defendant who has certified to the proper performance of the said work and furnishing the materials under the said contract in accordance therewith and to his satisfaction.

6. That the total amount earned under the said contract, after deducting from the said contract price for work not done, and adding thereto certain allowances and rebates as agreed upon between the parties to this action, was three million nine hundred and thirty thousand three hundred and ninety-seven 69/100 dollars. 99

7. That there has been paid on account of said contract the sum of three million eight hundred and fifty-nine thousand three hundred and forty 06/100 dollars.

8. That the balance thereof, to wit, seventy-one thousand and fifty-seven 63/100 dollars, though duly demanded, has never been paid.

100 FOR A SECOND CAUSE OF ACTION.

1. The plaintiff reavers all those allegations in the complaint stated and contained in paragraphs numbered I to V, and begs leave to refer to the same and make them a part of this cause of action without repetition.

2. That while the plaintiff was engaged in the proper performance of his work under said contract and in the execution and completion of the same he was required by the Chief Engineer of the defendant to perform and did so perform as required and at the special instance and request of the defendant large quantities of work in excess of that
101 called for by the said contract and at like request and by like requirements to furnish material and erect structures more in number and of a more expensive design than that called for in the plans and specifications under said contract at a largely increased cost to the plaintiff above that called for in the contract.

3. That the said work done and materials furnished were fairly and reasonably worth the sum of two hundred and thirty-two thousand seven hundred and five 66/100 dollars.

That, though duly demanded, no part of said sum has been paid.

102

FOR A THIRD CAUSE OF ACTION.

1. The plaintiff reavers all the allegations in the complaint stated, and contained in paragraphs numbered I. to V., and begs leave to refer to the same and make them a part of this cause of action without repetition.

2. That it was provided in said contract aforesaid that the defendant should furnish all right of way.

3. That the plaintiff failed at times to procure the right of way, as provided in said contract, and

particularly neglected to procure the same in time for the proper performance of said work under said contract in the months of September and October, 1887. 103

4. That, by reason of said failure to procure said right of way, as aforesaid, plaintiff was put to great loss, damage and expense in removing ties and rails, other track material, bridge timber, and in the performance of the said work, in the sum of two thousand one hundred and ninety-six dollars.

5. That, though duly demanded, no part of said sum has been paid.

104

FOR A FOURTH CAUSE OF ACTION.

That, prior to the making of the contract set out in first cause of action herein, the defendant falsely represented to the plaintiff that the amount of solid rock required to be excavated under the said contract was 119,565 cubic yards; that there was no loose rock; that the amount of culvert timber was 3,874,316 feet board measure; that there was 244,784 lineal feet piling; that there was 1,824 lineal feet of Howe Truss Bridging; that there were 291,840 feet B. M. of bridge ties, as being the entire amount of work of that class to be done in the completion of the contract above mentioned. 105

That the plaintiff made and entered into the said contract, relying on the said statements so made by the plaintiff and believing them to be true.

That thereafter, and in order to complete the remaining portion of the work under said contract, the plaintiff was compelled to and did perform the following amount of work, and furnish the following amount of materials, instead of those as represented by the defendant, to wit: excavating 137,555 cubic yards of solid rock; excavating 89,200 cubic yards of loose rock; furnishing 3,837,905 feet board measure of culvert timber; furnished 276,436

106 lineal feet of piling; furnishing 2,701 lineal feet Howe Truss Bridging; 291,840 B. M. feet oak bridge ties.

That, by reason of the said false representations, the plaintiff suffered great loss and damage, to wit, in the sum of $140,460.16, being the amount in value of the increased quantity of the materials above mentioned which he was required to furnish, and the work above mentioned which he was required to perform in excess of the amount represented at the time of the making of the said contract.

That, though duly demanded, no part of the said sum has been paid.

107

FOR A FIFTH CAUSE OF ACTION.

That, on the day of June, 188 , plaintiff was the owner of 97,000 feet board measure bridge timber, of the value and reasonably worth the sum of $2,425, which said timber had been brought and placed upon the line of the work for use in completing the said contract.

That on or about the said day last above mentioned, the defendant, without the knowledge and consent of the plaintiff, wrongfully took possession of the said timber, and converted the same to their own use, all to his loss and damage in the sum of
108 $2,425. That, though duly demanded, no part of the said sum has been paid.

FOR A SIXTH CAUSE OF ACTION.

That while the plaintiff was engaged in the proper performance of his said work, under said contract, the defendant wrongfully, negligently and unskillfully gave to the plaintiff wrong grades and lines under which to build the embankment and grade the roadbed of the said railroad, whereby the plaintiff was compelled to and did furnish to the defendant embankment or piling in excess of that required and called for in the contract in order to

reach the grades above given, to the amount of 385,000 cubic yards. 109

That by reason of the said wrongful, unskillful and negligent act of the defendant, and by their said fault, the plaintiff suffered great loss and damage, to wit, in the sum of $89,833.33⅓.

That, though duly demanded, no part of the said sum has been paid.

Wherefore, the plaintiff demands judgment against the defendant for the sum of three hundred and five thousand nine hundred and fifty-nine 29/100 dollars, with interest thereon from the 10th day of March, 1888, together with the costs and disbursements of this action. 110

KELLOGG, ROSE & SMITH,
Attorneys for Plaintiff,
120 Broadway,
New York City.

(Verified.)

HEMAN CLARK

AGAINST

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY. 111

Defendant's Answer to Amendments to Complaint.

The defendant the Chicago, Milwaukee and St. Paul Railway Company, without waiving any objections to the allowance of, or to the sufficiency of, the allegations of the amendments to the complaint as to any or either of the causes of action therein stated, answering the said amendments, denies each and every of the allegations contained in each

112 and every of the said amendments to the complaint.

The defendant, as a further and separate defense to the said several and alleged causes of action stated in the plaintiff's amendment to the complaint, alleges that in and by the contract mentioned in the complaint, and referred to in the said amendments to the complaint, it was provided that, whenever the chief engineer of the said defendant Railroad Company should furnish to it the said Railroad Company his certificate, that all the stipulations and covenants in the said contract or agreement contained to be by the plaintiff, the party of the second part thereto, kept and performed, have been by said
113 party well and truly observed and carried out, and that the said parties' railroad, proposed and agreed to be built as provided by the said contract, has been by said party constructed, built completed and finished in all respects in full conformity with the covenants and agreements in that behalf made by said plaintiff in said contract, and should with said certificate also present his, the said chief engineer's, estimate of the amount and value of the various kinds of work done by the plaintiff under the terms of the said contract or agreement, which said estimate it was agreed should be final and conclusive between the parties to the said contract or agreement, then the
114 said Railroad Company, the party of the first part to said agreement, should and would pay to the said plaintiff the sum or sums, if any, shown by said final estimate to be due to said second party under the terms of the said contract or agreement; and would also pay so much of the sum of five hundred thousand dollars mentioned in the said contract or agreement as had not previously been paid to said plaintiff; provided that the entire amount of compensation so to be paid to the said plaintiff should not exceed the sum of three million nine hundred and fifty-four thousand six hundred dollars.

The said defendant further alleges that, on or

about the third day of March, 1888, D. J. Whittimore, the Chief Engineer of the said defendant Railroad Company, duly certified and furnished to the said Railroad Company his certificate and final estimate of the amount and value of the work done and materials used by the plaintiff in building the railroad known as The Kansas City Line, provided in and by the said contract or agreement of March 6, 1886, to be built from Ottumwa, Iowa, to the Missouri River Bridge Abutment at Randolph Bluffs, Missouri, under the said contract of the plaintiff with the said Railroad Company, dated March 6, 1886, including all extra work done by said plaintiff Clark; and that the said railroad agreed to be built in and by the said contract, had been by the said plaintiff constructed, built, completed and finished in all respects in full conformity with the agreements of the said contract, except as the said Railroad Company had, by agreement with said Clark, assumed the construction and completion thereof; except that the said Chief Engineer stated that in the said final estimate no deduction had been made for any part of the sum of fifty thousand dollars mentioned in Section 4 of Article 13 of the contract, and that the amount in that article specified should be charged against the estimates as made. 115 116

And the said engineer also certified that the work was not completed until after August 1, 1887, but that no deduction of the sum of forty thousand dollars was made in the estimates of the said engineer from the contract price by reason of the road having not been completed by June 1, 1887, as provided by a contract made subsequent to the contract of March 6, 1886. 117

The defendant, further answering the second amendment to the complaint herein, denies that at the time therein alleged the plaintiff was the owner of 97,000 feet, board measure, of bridge timber of the value, or reasonably worth, the sum of $2,425, which had been brought and placed upon the line of the work for use in completing the said contract;

118 and it denies that on or about the date mentioned the defendant, without the knowledge or consent of the plaintiff, wrongfully took possession of the said timber and converted the same to their own use, to the loss and damage of the plaintiff in the sum of $2,425.

The defendant The Chicago, Milwaukee and St. Paul Railway Company, answering the amendments to the complaint aforesaid, and each of them, alleges that on or about the 9th day of March, 1888, an account was stated by and between the plaintiff and the defendant The Chicago, Milwaukee and St. Paul Railway Co. concerning the work done and material furnished by the plaintiff under the said
119 contract or agreement made between the said railway and the said plaintiff Clark, bearing date March 6, 1886, for the construction of a railroad from Ottumwa, in Iowa, to the Missouri River, as provided by and under the said contract, including all extra work performed and material furnished of every kind and description, whereby it was found and agreed that the total amount earned, or with which the said plaintiff Clark was entitled to be credited for all the work done and material furnished by him under said contract made between the said Railway Company and said Clark, bearing date March 6, 1886, for the construction of the railroad aforesaid from Ottumwa, in Iowa, to
120 the Missouri River, including all extra work performed and material furnished of every kind and description, less deductions made for work not done and work assumed by said company, amounted to the sum of three million eight hundred and ninety-five thousand seven hundred and ninety-eight dollars and seventy-nine cents ($3,895,798.79), and that the said plaintiff Clark was also entitled to be credited with the further sum of thirty-four thousand five hundred and ninety-eight dollars and ninety cents ($34,598.90), for materials sold by him to said company, and certain rebates and other matters of that description. And it was also found and agreed that

the said Chicago, Milwaukee and St. Paul Railway 121
Company had paid to the said Clark to apply on said contract in money, material, labor and transportation, the sum of three million six hundred and twenty-six thousand eight hundred and sixty-five dollars and twenty cents ($3,626,865.20), and that by the terms of Section 4, Article 13, of said contract, said Clark was to be charged in addition for transportation the sum of fifty thousand dollars ($50,000), and by a supplemental contract was to allow to the said Railway Company by way of forfeiture in case said railway was not completed by the first day of June, 1887, the further sum of forty thousand dollars ($40,000), making the amount paid on said contract, together with the allowance of said transportation 122
and the allowance of said forfeiture the sum of three million seven hundred and sixteen thousand eight hundred and sixty-five dollars and twenty cents ($3,716,865.20); and that the amount then still due to said Clark on said contract was the sum of two hundred and thirteen thousand five hundred and thirty-two dollars and forty-nine cents ($213,532.49).

And at the time of the said statement and settlement of the said account and accounting, it was further agreed by and between the said plaintiff Clark and the said Railway Company that, whereas, in and by said contract it was provided that the said plaintiff Clark should save the said defendant Railway Company free and harmless from all claims 123
that might be made against said Railway Company for liens of workmen and claims of sub-contractors and from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle and for all damages for cattle or other domestic animals killed or injured, and from damages suffered by said sub-contractors and employees, while engaged upon said work, of which said class of claims about forty thousand dollars in amount had been made upon and were then pending in Courts by divers claimants against said defendant Railway Company, and that the sum of

124 forty thousand dollars of the amount so found due as foresaid under the said contract of the said plaintiff Clark had been reserved and set aside by said Railway Company as indemnity or security for the payment of said claims, and all such other claims of the same class as may thereafter be made in case said claimants or any of them recover damages against said Railway Company, and that the said forty thousand dollars, or the balance thereof, after paying and settling such claims as might be so recovered against said Railway Company, was to be paid over to the said plaintiff Clark as soon as said claims were satisfied, or said Railway Company suitably indemnified from any loss on account of the
125 same.

Which said sum of forty thousand dollars was reserved and deducted from the said sum of two hundred and thirteen thousand five hundred and thirty-two dollars and forty-nine cents ($213,532.49), so as aforesaid found due to the said Clark, left as due and owing by said Railway Company then payable on the said contract to the said Clark the sum of one hundred and seventy-three thousand five hundred and thirty-two dollars and forty-nine cents ($173,-532.49).

And the said defendant Railway Company alleges that on or about the said 9th day of March, 1888, the said sum of one hundred and seventy-three
126 thousand five hundred and thirty-two dollars and forty-nine cents ($173,532.49) was duly paid by the said Railway Company to the said plaintiff Clark, and that the same was received by the said Clark of and from the said Railway Company in full satisfaction of the amount due to him, and in full satisfaction of all claims and demands of every kind, name and nature arising from or growing out of said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of said defendant Railway Company to account for said sum of forty thousand dollars reserved as hereinbefore stated. And the

said Clark thereupon signed and delivered to the 127
said defendant Railway Company a receipt in full satisfaction of the amount due him and in full satisfaction of all claims and demands of every name and nature against the said Railway Company arising from or growing out of said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of the Railway Company to account for said forty thousand dollars before mentioned.

And the defendant further alleges that it has duly accounted for the said sum of forty thousand dollars, and that the same has been duly paid out by it for the purposes for which it was provided, and agreed that the said sum should be reserved. 128

The defendant The Chicago, Milwaukee and St. Paul Railway Company, as a further and separate answer to the amendments to the complaint in this action, and each of them, alleges that the agreement or contract mentioned in the complaint in this action as having been made or entered into by and between the plaintiff and the defendant on the sixth day of March, 1886, and referred to in said amendments, which contract was in writing, by Section 1 of Article 21 thereof provided as follows, namely:

"It is further mutually agreed by and between
" the said parties that to prevent all disputes and
" misunderstandings between them in relation to 129
" any of the covenants or stipulations contained in
" this agreement, or to their performance by either
" of said parties, the Chief Engineer of the first
" party shall be, and hereby is, made an umpire to
" decide all questions arising from or growing out
" of this agreement, and the decision of the said
" Chief Engineer on any question or matter touch-
" ing this agreement shall be final and conclusive
" between the parties hereto, and each of said
" parties hereby waives any and all right of action,
" suit or suits, or other remedy in law or otherwise
" under this contract or arising out of the same."

130 The defendant the said Railway Company further alleges that the Chief Engineer of the said defendant Railway Company, in and by a certificate duly made by him, dated the 3d day of March, 1888, duly made a decision as to all questions and matters touching the said agreement, and arising from or growing out of the same, between the parties thereto, and that such decision is final and conclusive between the parties to this action; and that the said clause and provision of the said agreement hereinabove mentioned, and said decision is a bar to any right of action or suit by the plaintiff or other remedy in law or otherwise under the said contract, or arising out of the same, and to the cause and
131 causes of action alleged in the amendments to the complaint in this action.

The defendant the Chicago, Milwaukee and St. Paul Railway Company, further answering the said amendments to the complaint in this action, allege that each and every of the causes or alleged causes of action, stated and alleged in the said amendments to the complaint, accrued more than six years since, and that more than six years have elapsed since the transactions alleged in the said several amendments to the complaint occurred or are alleged to have occurred.

BANGS, STETSON, TRACY & MACVEAGH,
Attorneys for Defendant.

132

(Endorsed)—United States Circuit Court, Southern District of New York.—Heman Clark against The Chicago, Milwaukee and St. Paul Railway Company.—Defendant's answer to amendments to complaint.—Bangs, Stetson, Tracy & MacVeagh, Attorneys for Defendant, 15 Broad Street, New York City, New York.—U. S. Circuit Court.—Filed Mar. 21, 1898.—John A. Shields, Clerk.

At a Stated Term of the Circuit Court 133
of the United States for the Southern District of New York, held at the United States Court House in the City of New York, on the 19th day of October, 1894.

Present—Hon. E. HENRY LACOMBE,
Circuit Judge.

HEMAN CLARK

AGAINST 134

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

This action coming on to be tried at the present term of this Court, and

On reading and filing the consent in writing hereto annexed, and upon the consent of the attorneys for the plaintiff and defendant respectively in open court,

It is ordered, that this action and all the issues therein be and the same are hereby referred to Hon. 135
William G. Choate as sole Referee, to hear and determine the same.

It is further ordered, that no judgment upon the report of such Referee shall be entered until after the expiration of ten days from the service of a notice of the filing of the report of the Referee and of the judgment proposed to be entered thereon.

E. H. LACOMBE.

136 UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HEMAN CLARK

AGAINST

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

137 It is hereby stipulated and agreed that the above entitled action and all the issues therein be referred to the Hon. William G. Choate, as sole Referee, to hear and determine the same.

It is further stipulated and agreed that judgment upon the report of such Referee shall not be entered herein until after ten days' notice of the filing of the report of the Referee and of the judgment proposed to be entered thereon shall have been given to the opposite party.

Dated New York, October 19, 1894.

KELLOGG, ROSE & SMITH,
Plaintiff's Attorneys.

138 BANGS, STETSON, TRACY & MACVEAGH,
Defendant's Attorneys.

(Endorsed)—U. S. Circuit Court, Southern District of N. Y.—Heman Clark against The Chicago, Milwaukee and St. Paul Railway Company.—Consent and Order of Reference. — Kellogg, Rose & Smith, Attys. for Plff., 120 Broadway, New York. -U. S. Circuit Court.--Filed Oct. 19, 1894.—John A. Shields, Clerk.

At a Term of the Circuit Court of the 139
United States for the Southern District
of New York, held at the United States
Court House, in the City of New York,
on the 3d day of January, 1895.

Present—Hon. E. HENRY LACOMBE,
Circuit Judge.

HEMAN CLARK

AGAINST

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY. 140

An order having been entered in the above entitled action at a Stated Term of this Court, held on the 19th day of October, 1894, upon the consent of the attorneys for the plaintiff and defendant, respectively, whereby all the issues in this action were referred to Hon. William G. Choate, as sole Referee, to hear and determine the same, and the said William G. Choate having declined to act as Referee 141
in this action, it is now, upon consent of the attorneys for the plaintiff and defendant respectively hereto annexed, and on motion of Messrs. Kellogg, Rose & Smith, attorneys for the plaintiff, ordered that the said order of the 19th day of October, 1894 be, and the same is hereby vacated.

And on like consent and motion it is ordered that Hon. George Hoadley be, and he is hereby appointed Referee in this action in the place and stead of the said Hon. William G. Choate, and that this action and all the issues therein be, and the same are hereby

142 referred to the said Hon. George Hoadly, as sole Referee to hear and determine the same.

And upon like consent it is further ordered, that no judgment upon the report of such Referee shall be entered until after the expiration of ten days from the service of the notice of the filing of the report of the said Referee, and of the judgment proposed to be entered thereon.

E. H. LACOMBE,
U. S. Circuit Judge.

We hereby consent to the entry of the foregoing order.

143

BANGS, STETSON, TRACY & MACVEAGH,
Attorneys for Defendant.

KELLOGG, ROSE & SMITH,
Attorneys for Plaintiff.

(Endorsed)—U. S. Circuit Court, Southern District of New York.—Heman Clark against The Chicago, Milwaukee & St. Paul Railway Co.—Consent and Order.—Kellogg, Rose & Smith, Attys. for Plff., 120 Broadway, New York.—U. S. Circuit Court.—Filed Jan. 3, 1895.—John A. Shields, Clerk.

144

IN THE CIRCUIT COURT OF THE UNITED STATES 145

FOR THE SECOND CIRCUIT AND SOUTHERN DISTRICT OF NEW YORK.

HEMAN CLARK

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY. 146

Report of George Hoadly, Referee in the above entitled action.

TO THE HONORABLE, THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SECOND CIRCUIT AND SOUTHERN DISTRICT OF NEW YORK.

On the 3d day of January, 1895, an order was entered in the above entitled cause, by the consent of parties, appointing the undersigned, George Hoadly, Referee in this action, in the place and stead of William G. Choate, resigned, and this action and all the issues therein were thereby referred to me as 147 sole Referee to hear and determine the same.

In pursuance of the above entitled order, on March 11, 1895, I took the oath faithfully and fairly to try the issues and determine the questions submitted to me in the above entitled cause, and make a true report thereof according to the best of my understanding, and thereupon, on March 21, 1895, the trial of the cause began. It has since proceeded through numerous sessions, the examination of many witnesses, the reading of depositions, and

148 elaborate argument both orally and in writing upon the facts and the law, by counsel upon both sides.

The argument was finally submitted to me upon September 9, 1897, but printed requests to find having been furnished by counsel for the defendant, were followed a few days after the 9th day of September, 1897, by printed request to find submitted by the plaintiff.

These requests to find, although unnecessary under the present practice, have proved of great service to me by assisting in the dissection of the case and the reduction of its voluminous mass to well ordered and defined particulars.

In reaching what I deem to be just conclusions
149 upon the issues between the parties, the first matter to be considered is the nature of the case and the circumstances which led to it.

On March 6, 1886 a contract was entered into in writing between the defendant, The Chicago, Milwaukee and St. Paul Railway Company, a corporation of Wisconsin, of the first part, and Heman Clark, the plaintiff, of New York City, of the second part.

It will be necessary, in the course of this report, to give so much detailed attention to this contract, in disposing of the various controversies that have arisen under it, that it does not seem to me worth while to enter into a further general description of
150 the same than the following:

This agreement provided for the construction and full completion, ready for rolling stock, by the plaintiff Clark, of a line of railroad, for the party of the first part, the Railway Company from Ottumwa, Iowa, to Harlem Station (afterwards changed to Randolph's Bluff), Clay County, Missouri, a total distance of $202\frac{8}{10}$ miles, the same to be constructed, built and fully completed, ready for the rolling stock, in accordance—

"with certain profiles, plans and specifications now made or hereafter to be made, by the Chief

Engineer of said first party, and under the supervision and direction of and to the satisfaction of said Chief Engineer," 151

all the materials for which, and the construction, building and completion of the same,

"in the manner and within the time required by said first party, upon the terms and conditions hereinafter mentioned and set forth,"

were to be provided by Clark, the party of the second part.

In payment for the same when completed, Clark was to receive, according to the fifteenth article of the contract, the sum, in all, of three millions nine hundred and fifty-four thousand six hundred dollars, which amount was originally three millions nine 152 hundred and fourteen thousand six hundred dollars, but changed before delivery of the contract, to the sum above stated, three million nine hundred and fifty-four thousand six hundred dollars, an addition to the contract price, as originally written in the contract, of the sum of forty thousand dollars.

By the terms of the contract as executed, Article one, Section two, Clark agreed to prosecute the work with such force and means as would,

"in the opinion of the Chief Engineer of said first party ensure the completion thereof by the first day of August, 1887."

The road was fully completed and ready for operation in the winter of 1887-1888, and in February, 153 1888, the parties endeavored, by their representatives, to adjust and ascertain the exact amount remaining due to Clark, with the result of differences of opinion, however, which ultimately led to this suit.

Much further reference will be necessary, in the progress of this report, to detailed provisions of the contract, for which reason, and as when taken together, they will describe the entire agreement, so far as it is necessary to be considered, no further reference will be made to it here.

154 The pleadings have been amended since the reference of the case to me, and now stand in the form of amended complaint, bill of particulars, an amended answer to the plaintiff's original complaint, and answer to the amendments to the complaint.

First Cause of Action.

The amended complaint, for a first cause of action, omitting all unnecessary particularity, avers the existence of the contract, the obligation imposed thereby upon the plaintiff to build the railroad, the obligation imposed upon the defendant to pay for the same; that the contract had been fully per-
155 formed by the plaintiff, excepting such portions as were waived by the defendant, and been accepted by the defendant and the Chief Engineer of the defendant, who had certified to the proper performance of the work, in furnishing the materials under said contract, in accordance therewith, and to his satisfaction; that the total amount earned under the contract, after deducting price for work not done and adding certain allowances and rebates as agreed on, was $3,930,397.69, on account of which there has been paid $3,859,340.06; that the balance, viz., $71,057.63, though duly demanded, has never been paid.

Second Cause of Action.

156 This pleading avers that the plaintiff was, during the course of construction, required by the Chief Engineer to perform large quantities of extra work and furnish materials and structures more in number and more expensive in design than that called for in the plans and specifications, at a largely increased cost to him; that said work and materials so furnished were fairly and reasonably worth the sum of two hundred and thirty-two thousand seven hundred and five and $\frac{66}{100}$ dollars, no part of which has been paid though duly demanded.

THIRD CAUSE OF ACTION. 157

The third cause of action avers that the contract provided that the defendant should furnish all the right of way in the performance of which obligation the defendant failed and particularly neglected—

" to procure the same in time for the proper per-
" formance of said work under said contract in the
" months of September and October, 1887,"

by reason of which plaintiff was put to great loss, damage and expense in removing ties and rails, track, materials, in the sum of $2,196, no part of which has been paid, though duly demanded.

158

FOURTH CAUSE OF ACTION.

That prior to the making of the contract the defendant falsely represented to the plaintiff that amount of solid rock to be excavated under the said contract was 119,565 cubic yards; that there was no loose rock; that the amount of culvert timber was 3,874,316 feet board measure; that there was 244,-784 lineal feet piling, 1,824 lineal feet Howe truss bridging, 291,840 board measure bridge tires as being the entire amount of work of that class to be done in the completion of the contract.

That the plaintiff made and entered into the contract, relying on said statements, and believing 159
them to be true; that afterwards and in order to complete the work under said contract, the plaintiff was compelled to and did furnish the following amount of work and materials, instead of those as above stated, to wit: Excavating 137,555 cubic yards of solid rock; excavating 89,200 cubic yards of loose rock; furnishing 3,837,905 feet, board measure, culvert timber; furnishing 276,436 lineal feet piling, 2,701 lineal feet Howe truss bridging, 291,840 board measure feet oak bridge tires by reason of which false representations the plaintiff has suffered great loss and damage in the sum of $140,460.16, being

160 the amount in value of the increased quantity of the materials above mentioned and the work in excess of the amount represented at the time of making the said contract; that no part of said sum has been paid, although duly demanded.

FIFTH CAUSE OF ACTION.

That on the day of June, 188 , the plaintiff was owner of 97,000 feet, board measure, bridge timber, of the value of $2,425, which had been brought and placed upon the line of work in building said track; that on or about said date the defendant took possession of the same and converted it to its
161 own use, all to his loss and damage in the sum of $2,425, no part of which has been paid, although duly demanded.

SIXTH CAUSE OF ACTION.

That while the plaintiff was engaged in the proper performance of his work under the contract the defendant wrongfully, negligently and unskillfully gave to the plaintiff wrong grades and lines under which to build the embankments and grade the roadbed, whereby the plaintiff was compelled to and did furnish embankment and piling in excess of the amount agreed upon by the contract to the
162 amount of 385,000 cubic yards, by reason of which wrongful, unskillful and negligent acts of the defendant and by its own fault, the plaintiff suffered as a damage in the sum of $89,833.33⅓, no part of which sum has been paid, although duly demanded, and the complaint (verified) concludes by demanding judgment against the defendant in the sum of $305,959.28, with interest thereon from the 10th day of March, 1888, together with costs and disbursements.

Together with the amended complaint, the plaintiff has filed a bill of particulars, showing some of the items of the same, to which no further refer-

ence need be given now, but will receive due con- 163
sideration in its proper place.

ANSWER TO THE FIRST CAUSE OF ACTION.

The answer consists of an admission of the averment in the first cause of action of the execution of the contract, a denial of its completion and performance, an admission that so far as the work was done and performed, it has been accepted; an admission that the Chief Engineer of the defendant has certified that the railroad agreed to be built in and by said contract has been constructed, built and equipped and finished in all respects, in full conformity with the agreement in said contract, 164
except so far as by agreement with the said Clark, the Railway Company has assumed the same; a denial that the total amount, after deducting for work not done and adding certain allowances or rebates agreed upon, was or is the sum of $3,930,-397.69; a denial that there has been paid to the plaintiff on account of the contract no more than the sum of $3,859,340.06, or that a balance of $71,-057.63 is still due thereon, or has never been paid.

For further answer to the first cause of action, the defendant (erroneously printed "plaintiff" on page 3 of printed answer), sets up the provision of the contract by which it is required that the Chief Engineer shall furnish to the Railway Company 165
his certificate that the stipulations and covenants in the contract contained have been performed by plaintiff, together with the Chief Engineer's estimate of the amount and value of the various kinds of work done by the plaintiff, which estimate should be final and conclusive between the parties; that then the said Railroad Company should pay the sums shown by said final estimate to be due, provided that the entire amount of compensation so to be paid to the plaintiffs should not exceed the sum of $3,954, 600; and the answer further alleges that on or about the 3d of March, 1888, the Chief Engineer

166 of the defendant Railway Company did furnish his said certificate, together with his final estimate of the amount and value of the work done and materials used in building the Kansas City line of the defendant from Ottumwa, Iowa, to the Missouri River Abutment, at Randolph's Bluff, Missouri, including all extra work; and that the railroad had been constructed, completed and finished in all respects in accordance with the contract, except that as the said Company had by agreement with Clark assumed the construction and completion thereof, and that the compensation agreed upon had been deducted in such estimates from the amount which would have been due and owing
167 said Clark had he completed all said work; that in and by said certificate the defendant Railway Company certified that the total amount and value of the work done and materials used by said Clark in building the line was the sum of $3,895,789.79. That by Section 2 of Article 9 and Section 4 of Article 14 of the contract the plaintiff Clark agreed to pay to the defendant company the sum of fifty thousand dollars for its services in transporting teams, tools, machinery, implements, supplies, merchandise and all railroad material to be used in construction and for the use by the plaintiff of the defendant's locomotives and cars in laying the track, and the plaintiff Clark agreed to allow to the defend-
168 ant company, to be deducted from the contract price, the further sum of $40,000, by way of forfeiture or damages in case the said railroad agreed in and by said contract to be built was not completed by the first day of June, 1887, and the defendant alleges that the said railway was not completed by the first day of June, 1887, or the first day of August, 1887, as provided by the contract.

And defendant further alleges that it has paid to or for the plaintiff Clark or on his account in money, material, labor and transportation, a sum in excess of any and all amounts due or earned by the plaintiff under said contract, or certified and allowed by

the Chief Engineer, including all extra work performed or material furnished by the plaintiff under said contract or in addition thereto. 169

SECOND DEFENSE.

The second defense being the defense to the second cause of action denies the averments of the said second cause of action, that during the proper performance of his work the plaintiff Clark was required by the Chief Engineer of the defendant to perform any quantity of work in excess of that called for by the contract, except or otherwise than as stated in the said Chief Engineer's certificate and final estimate; or that he furnished materials or erected structures 170 more in quantity or in number or of a more expensive design than that called for in the plans and specifications, at a largely increased cost of expenditure, except or otherwise than as stated and certified to in and by said certificate and final estimate, which as it is alleged, included all extra work done by the plaintiff in the performance of said contract.

And the defendant denies that any alleged work or materials furnished in excess of that required by the contract or structures erected of a more expensive design than that called for by the plans and specifications under said contract, were or are reasonably worth the sum of $232,705.68, or any other sum in excess of that allowed for, and with which 171 the plaintiff was given credit in the certificate and final estimate of the Chief Engineer.

And the defendant further alleges that in and by said contract it was provided that if the plaintiff was required to furnish any material or do any work not required thereby and agreed to be furnished or performed by him or should be required by said Chief Engineer to furnish and erect any structure of a design or plan more expensive than that called for by the standard plans of the defendant and agreed upon by the plaintiff to be furnished and erected, such requirement should be made in writing by the Chief

172 Engineer, and that the plaintiff should be entitled to receive such just and reasonable compensation therefor as the Chief Engineer should fix and determine.

And the defendant Company alleges that the Chief Engineer has fixed and determined the compensation therefor, which is included in the said final estimate and certificate of the Chief Engineer aforesaid.

THIRD DEFENSE.

For answer to the third alleged cause of action the defendant avers that it was provided by said contract that the defendant should furnish at its
173 own cost and expense at such time as not to delay the execution of the work, all the lands which are or might be marked out and designated by the defendant's Chief Engineer for right of way as said lands might be needed for construction, and denies that the defendant at any time failed to procure the same for the construction of the said railroad, or that it particularly neglected to procure the same for the proper performance of the work under said contract in the months of October or November, 1887, and denies that by reason of any alleged failure to procure the right of way as alleged in the complaint the plaintiff was put to great or any loss, damage or expense in removing ties and rails, or other work, material or bridge timber, in the sum
174 of $2,196, or any other sum.

FOURTH DEFENSE.

The fourth defense avers that on or about the 12th day of July, 1887, a further and supplemental contract was made between the parties, whereby the defendant undertook and agreed to build a portion of the line of railroad and of the work agreed to be done in the construction thereof by the said contract of March 6, 1886, at a price and upon the consideration named therein, which the defendant agreed to pay; that on or about the 3d of March,

1888, the Chief Engineer of the Railway Company made his final estimate and certificate of the amount and value of the work done and materials used by the plaintiff in building the Kansas City line from Ottumwa, Iowa, to the Missouri River Bridge Abutment at Randolph Bluffs, Missouri, to which point the terminus of the said line had been changed from Harlem station, Missouri, as provided in said contract, including all extra work done by the plaintiff, in and by which certificate and estimate the Chief Engineer certified that the plaintiff had earned, including all extra work, $3.895,789.79, and thereupon on or about March 9, 1888, an account was stated and agreed to by and between the parties, whereby the amount of compensation due to the plaintiff for all work done under the contract, including extra work and materials, less deductions for work not done and work assumed by the defendant Company, was agreed upon and fixed and adjusted at the sum of $3,895,798.79, and it was also agreed that the plaintiff should also be credited with the further sum of $34,598.90 for materials sold by him to said Company and certain rebates and other matters of that description, making in all the sum of $3,930,397.69; and it was further agreed, fixed and adjusted that the defendant Company had paid to the plaintiff to apply on said contract, in money, material, labor and transportation, the sum of $3,-626,865.20, and that by the terms of Section 4 of Article 13 of said contract, the plaintiff was to be charged, in addition for transportation, $50,000,

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"and that by a supplemental contract between the plaintiff and the defendant, said Clark was also to allow it, the defendant Railroad Company, by way of forfeiture in case said railroad was not completed by the first day of June, 1887, the further sum of $40,000, making the amount paid on said contract, together with the allowance of said transportation and the allowance of said forefeiture, the sum of $3,716,865.20, and that the amount then due to the said Clark on said contract was the sum of $213,532.49."

172 Engineer, and that the plaintiff should be entitled to receive such just and reasonable compensation therefor as the Chief Engineer should fix and determine.

And the defendant Company alleges that the Chief Engineer has fixed and determined the compensation therefor, which is included in the said final estimate and certificate of the Chief Engineer aforesaid.

THIRD DEFENSE.

For answer to the third alleged cause of action the defendant avers that it was provided by said contract that the defendant should furnish at its
173 own cost and expense at such time as not to delay the execution of the work, all the lands which are or might be marked out and designated by the defendant's Chief Engineer for right of way as said lands might be needed for construction, and denies that the defendant at any time failed to procure the same for the construction of the said railroad, or that it particularly neglected to procure the same for the proper performance of the work under said contract in the months of October or November, 1887, and denies that by reason of any alleged failure to procure the right of way as alleged in the complaint the plaintiff was put to great or any loss, damage or expense in removing ties and rails, or other work, material or bridge timber, in the sum
174 of $2,196, or any other sum.

FOURTH DEFENSE.

The fourth defense avers that on or about the 12th day of July, 1887, a further and supplemental contract was made between the parties, whereby the defendant undertook and agreed to build a portion of the line of railroad and of the work agreed to be done in the construction thereof by the said contract of March 6, 1886, at a price and upon the consideration named therein, which the defendant agreed to pay; that on or about the 3d of March,

1888, the Chief Engineer of the Railway Company made his final estimate and certificate of the amount and value of the work done and materials used by the plaintiff in building the Kansas City line from Ottumwa, Iowa, to the Missouri River Bridge Abutment at Randolph Bluffs, Missouri, to which point the terminus of the said line had been changed from Harlem station, Missouri, as provided in said contract, including all extra work done by the plaintiff, in and by which certificate and estimate the Chief Engineer certified that the plaintiff had earned, including all extra work, $3.895,789.79, and thereupon on or about March 9, 1888, an account was stated and agreed to by and between the parties, whereby the amount of compensation due to the plaintiff for all work done under the contract, including extra work and materials, less deductions for work not done and work assumed by the defendant Company, was agreed upon and fixed and adjusted at the sum of $3,895,798.79, and it was also agreed that the plaintiff should also be credited with the further sum of $34,598.90 for materials sold by him to said Company and certain rebates and other matters of that description, making in all the sum of $3,930,397.69; and it was further agreed, fixed and adjusted that the defendant Company had paid to the plaintiff to apply on said contract, in money, material, labor and transportation, the sum of $3,-626,865.20, and that by the terms of Section 4 of Article 13 of said contract, the plaintiff was to be charged, in addition for transportation, $50,000,

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"and that by a supplemental contract between the plaintiff and the defendant, said Clark was also to allow it, the defendant Railroad Company, by way of forfeiture in case said railroad was not completed by the first day of June, 1887, the further sum of $40,000, making the amount paid on said contract, together with the allowance of said transportation and the allowance of said forefeiture, the sum of $3,716.865.20, and that the amount then due to the said Clark on said contract was the sum of $213,532.49."

178 That it was further agreed between the plaintiff and the defendant that whereas by said contract it had been provided that the plaintiff should save the defendant free and harmless from claims against the Railroad Company for liens of workmen and claims of sub-contractors, and from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle, and for all damages to all cattle and domestic animals killed, and for all damages suffered by said employees while engaged upon said work (for which class of liabilities claims for about $40,000 in amount had been made upon and were pending in courts by divers claimants against said Railway Company), and that the sum
179 of $40,000 of the amount then due to said plaintiff had been reserved and set aside by the defendant Company as indemnity or security for the payment of said claims or payments of similar claims as might thereby be made in case said claims or any of them should be reduced to judgment against said Railway Company, and that the balance of said $40,000 should be paid over to the plaintiff as soon as the same were satisfied or the Company indemnified,

"deducting which sum of $40,000 from the stated balance of $213,532.49, then found to be due to the said Clark, left as then due and owing by said Railway Company to the said plaintiff, under said contract, the sum of $173,532.49."

180 And thereupon, upon March 9, 1888, the defendant Company duly paid the said sum of $173,542.49 to said Clark, and the plaintiff thereupon acknowledged in writing that he had received from the defendant Company the said sum—

"in full satisfaction of the amount due to him on such estimates of said Chief Engineer of the said defendant Railway Company, and in full satisfaction of all claims and demands of every kind, name and nature arising from or growing out of the said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of the said Railway Company, to account for said sum of $40,-

000, as provided in and by the said receipt and acknowledgment of the said plaintiff Clark." 181

And the defendant further alleges that it has duly paid and applied, for the purposes specified in said agreement and receipt, the said sum of $40,000 so reserved and a sum of $521.75 in excess thereof over and above all other sums received by or for account of the plaintiff, for which sum of $521.75 the defendant demands judgment as a counterclaim against the said plaintiff.

CONCLUSIONS OF FACT AND LAW.

I shall dispose of these in the order of their presentation by the plaintiff. 182

FIRST CAUSE OF ACTION.

The sum of $71,057.63 claimed in this count, is made up of the following:

FIRST.—Claim of defendant to be credited for nut locks delivered to the plaintiff and used by plaintiff in the construction of the road	$9,558 63
SECOND.—Forfeiture because of non-completion of the railroad on the first day of June, 1887, in accordance with an alleged supplemental contract entered into between the parties	40,000 00
THIRD.—Moneys paid by the defendant to sub-contractors without right, including moneys paid in compensation for the death of a brakeman during construction, in all	21,499 00
Making a total of	$71,057 63

183

FIRST ITEM. NUT LOCKS.

The first question thus presented is as to the liability of the plaintiff to pay to the defendant the

184 sum of $9,558.63. The history of this item is as follows:

There is no specific reference to nut locks in the contract.

Soon after the contract began the defendant made a shipment of nut locks to William W. Hegeman, who, as agent for the plaintiff, had control of the work done for Clark in building the road, for use in constructing the track, with a bill charging the amount of shipment to Clark as paid by the Company for Clark.

Upon this a controversy arose, Hegeman denying for Clark, that he was bound to supply nut locks in building the road, and the Company insisting that
185 he was.

By common consent this question was adjourned for the time being, and the road was built with nut locks which were, from time to time, received, placed in the track and credited upon the books of Clark by Hegeman to the Company, but with the understanding that the claim of the defendant was not thereby admitted, but that its ultimate decision was postponed until after the completion of the road.

The nut lock is a small iron or steel springing washer. When closed in the tracksplice, it looks from outside exactly like a washer, but operating to hold the nut in its proper place, notwithstanding the
186 tendency to become loose and escape caused by the motion of trains.

The defendant claims that the use of nut locks by the plaintiff in constructing the track is required by various provisions of the contract, though not referred to anywhere by name.

By the first article of the contract, the plaintiff agrees:

"to furnish all the material for and also to execute, construct and finish, in every respect, in the most substantial and workmanlike manner, all the work hereinafter specified and required by the said first party to be done in the construction and completion

of the said first party's line of railroad (describing it)." 187

And again, in the third section of the first article, it is provided that the

" materials and workmanship required by said first party to be furnished or performed for, in or about the work hereinbefore mentioned and hereinafter particularly specified and set forth, shall be furnished and performed in strict accordance with the rules, regulations and specifications therefor now made or hereafter to be made by said Chief Engineer, and, in all respects, to his satisfaction and acceptance."

By the terms of the sixth article, first section, the party of the second part, (Clark) 188

" further agrees to furnish and lay in place all the track material required by the first party for 202 $\frac{8}{10}$ miles of main track, and for the hereinafter mentioned side tracks of its railroad aforesaid, including in said track material so by him to be furnished and laid in place, steel rails of sixty pounds per yard, splices and bolts of the J. T. Clark patent, and spikes and ties and all said material shall be of the said first party's standard and size.

The said second party also agrees to purchase from said first party all the steel rails, angle bars and bolts for same, and all the track spike required for the main and side tracks aforesaid, and to pay for the same the following rates, to wit: * * *

Angle bars one and sixty five one hundreds (1 65/100) cents per lb. f. o. b. in Milwaukee. 189

Track bolts two and sixty one hundredths (2 60/100ths) cents per lb. f. o. b. in Milwaukee or Chicago."

The fourth section of the sixth article bound the party of the second part (Clark)

" to fully spike all the main and side tracks, * * * to place and well bolt the splices therefor, and do all the work of laying said tracks in the most approved manner, and to the satisfaction and acceptance of the said first party's Chief Engineer."

190 Article 14 contained (Section 1) the following provision:

"The party of the first part (the company) further agrees to sell to the said second party all the steel rails, angle bars, track bolts and track spike required for laying all the main and side tracks mentioned and referred to in this agreement, at the price hereinbefore in Section One of Article Six agreed by said second party to be paid for the said materials respectively."

This makes it manifest that if there be in this contract any provision for supplying nut locks, the price to be paid therefor is to be found in Section One of Article Six and nowhere else.

191 Indeed, there is no suggestion that it is found anywhere else, the claim being that the nut locks furnished were by the rules of justice, *quantum meruit*, to be paid for at cost to the company without any provision in the contract therefor, which theory is in direct contradiction to Section One of Article Six if that section controls the subject of price for angle bars and track bolts, within which terms, if referred to at all in the contract, are embraced nut locks.

Another provision may be considered as having some bearing upon the question of the liability of Clark to give credit for the amount of the cost of the nut locks to the company. It is contained in the sixteenth article, Section Six, in these words:

192 "It is further mutually understood and agreed by and between the said parties that the said first party (the company) has contracted with manufacturers, esteemed to be safe, responsible and reliable, for all the steel rails, angle bars, track bolts and track spike which it, the said first party, has hereinbefore (in Section 1 of Article 14) agreed to sell and deliver to the said second party,"

and that all of said contracts contained the usual and customary clause, by which manufacturers are not held to damages for failure to deliver at specific times when caused by strikes, injury to or de-

struction of their works by fire or elements or by other causes beyond their control. 193

It is therefore, by the terms of this section, expressly understood and agreed that the second party (Clark) accepts the above mentioned conditions in said contracts contained, and

" that the delivery by said first party of said rails, angle bars, bolts and spikes shall be subject as to the time of such delivery to the said above mentioned conditions, and that said first party shall be bound to deliver said rails, bars, bolts and spikes only when and as received from the manufacturers thereof,"

and not to be liable for failure or delay in delivery when beyond the first party's power to control. 194 The seventh section provides that the track material sold and delivered to said party shall be paid for or charged to him when delivered, and the amount deducted, as shown by any monthly estimate to be due him.

The agreement between Hegeman and Kimball that the question of nut locks should remain in abeyance until the completion of the work, prevents the action taken either by Clark in crediting the bills or in the payment of freight on track material from having any effect or influence upon the decision of the question now in hand.

It is claimed that the use of nut locks is necessary to the building of a first class modern railroad, and, therefore, that the use of nut locks in this case was 195 necessary, in order to build such a road as the first article of the contract required; but the difficulty with this theory is, that the contract called not for a first class railroad in general terms, to which this argument might fairly apply, but for a railroad—

" hereinafter specified and required by said first party to be done in the construction and completion thereof,"

and thereupon the parties proceed, at very great length, with a contract embraced in twenty-one articles, and covering twenty-seven printed pages, to

196 specify in detail what was required, and in this detail, there is no mention of nut locks.

On the contrary, the language of the sixth article seems to exclude the possibility of any intention at the time of executing the contract, to compel the use of nut locks, unless, which I cannot find to be the fact, they are required by the words—

" splices and bolts of the J. T. Clark patent,"

for the conclusive reason that—

" all steel rails, angle bars and bolts "

to be furnished by the Railroad Company and the angle bars and track bolts were to be paid for by the
197 pound.

Nut locks, whether of the Verona or National pattern, as used in the construction of this track, are patented articles, sold by tale or number; and if measured in this contract by the pound, as being embraced in the words " angle bars or track bolts or splices " would amount to a sum of money very much less than the $9,558.63 now in dispute.

If, therefore, it was the intention of the parties to require the use of nut locks, the price resulting from the obligations they entered into is now a very much smaller sum than the cost or amount claimed, but the fact that nut locks are not bought and sold by the pound is, to my mind, conclusive, that, at the
198 time the contract was made, the parties had not the use of nut locks in contemplation.

A considerable portion, not by any means the majority, however, in mileage of the Chicago, Milwaukee and St. Paul Railroad, has been constructed without nut locks, and, therefore, it was quite possible for Mr. Hegeman to have understood the contract, as he claims he did, as not embracing the duty to furnish or pay for nut locks.

The probability seems to me to be that, in preparing this contract, the subject was overlooked or forgotten by the Chief Engineer, but that when the contract came to be executed, Kimball, the manager

or superintendent of construction for the Company, seeing the importance of their use, insisted upon their insertion in the track, whereupon a dispute arose, and it was agreed that they should be supplied by the Company and in fact used, the question between the parties as to who should pay for them being left in abeyance until the completion and construction of the road.

This finding leads me to the consideration of the question, whether the price of the nut locks furnished by the Company to Hegeman, and used by him for Clark in the construction of the road, although outside the contract, is compulsory by force of the authority committed by the contract to the Chief Engineer. The peculiar aspect of this question must not be forgotten. The item is a credit by the Company. It is in the nature of a claim for payment to the Company by a credit, upon the amount due by it upon the contract, for nut locks furnished to Clark during construction, which nut locks, as I find, he was not obliged to credit to the Company by force of any provision of the contract itself.

The contract, however, provides, in its recitals, that it is the desire of the Company to have the road built and fully equipped, ready for rolling stock.

"in accordance, in all respect, with certain profiles, plans and specifications now made or hereafter to be made by the Chief Engineer of said first party, and under the supervision and direction, and to the satisfaction of said Chief Engineer."

And again, Article 1, Section 2, that the prosecution of the work is—

"to be subject, at all times, during the progress of said work, to the directions of said Chief Engineer, as to the mode of doing *the same*."

And again same article, Section 3.

"that all the materials and workmanship required in or about the work hereinafter mentioned and hereinafter particularly specified and set forth shall

202 be furnished and performed in strict accordance with *the rules, regulations and specificatons* thereof now made or hereafter to be made by said Chief Engineer, and in all respects to his satisfaction and acceptance."

The fifteenth article fixes the amount and manner of payment for the road to be made by the second party—

"for building, constructing and fully completing, *in strict conformity to the stipulations and requirements hereinbefore mentioned*, the said railroad."

The second section of Article 15, contains the following:

203 "The party of the first pat further agrees that whenever the said Chief Engineer shall furnish to it, the said first party, his certificate that all the stipulations and covenants in this agreement contained, to be by said second party kept and performed, have been, by said party, well and truly observed and carried out, and that the first party's railroad herein proposed and agreed to be built has been, by said second party, constructed, built, completed and finished, in all respects, in full conformity with the covenants and agreements hereinbefore in that behalf made by the said second party, and shall, with said certificate, also present his Chief Engineer's estimate of the amount and value of the various kinds of work done by said second party, under the terms of this agreement, which said estimate shall be final and conclusive between the par-
204 ties hereto, then the said first party shall and will pay to the said second party the sum or sums, if any, shown by said final estimate to be due to said second party under the terms of this agreement." * * *

It is quite manifest that these provisions have no reference to the case of a credit which the first party may claim to be entitled to for materials not required by the contract to be furnished by Clark, but which the Company actually supplied to him during the progress of the work.

The obligation of the Chief Engineer and the right of the Chief Engineer is to fix and certify the

amount and value of the work and materials done by Clark, not the amount of credits to which the Company is entitled. And with this his certificate actually complies. It contains no reference to nut locks as such. 205

A statement of cash paid or the claim of credit for cash paid erroneously inserted by the Chief Engineer in his certificate would have, by the terms of this language of the contract, no binding force or effect upon the rights of Clark or the liability of the Company therefor, nor, in my opinion, does the provision of the next article (Art. 16, Sec. 3) for the payment of extra work, have any reference to the matter now in hand.

The third section of Article 16 provides, that, in case the second party shall be required in writing by the Chief Engineer to furnish any extra material or do any extra work, he shall be paid therefor such just and reasonable compensation "as the Chief Engineer shall fix and determine." 206

This provision of this contract will be hereafter referred to more at length in another part of the case, but it is enough to say now that the material thus referred to, was to be furnished by the Company, not by Clark, and, therefore, could not be considered under any circumstances as having reference to the nut locks.

The 21st article, Section 1, is in the following words: 207

"It is further mutually agreed, by and between the parties, that to prevent all disputes and misunderstandings between them in relation to any of the covenants or stipulations in this agreement, or to their performance by either of the parties, the Chief Engineer of the first party shall be and hereby is made an umpire, to decide all questions arising from or growing out of this agreement, and the decision of the Chief Engineer on any *question or matter touching this agreement shall be final and conclusive between the parties hereto*, and each of said parties hereby waives any and all right of action, suit or suits or other remedy in law or otherwise under this contract or arising out of the same."

208 Giving to this important provision of the contract its most extended force and effect, it nevertheless remains clear that the Chief Engineer was not thereby made an umpire to settle questions of accounting between the parties.

If a sum of money were paid at any time by the Company to the contractor for which he refused to give credit, the Chief Engineer's charge of the same to him would not bind him, nor would the refusal to charge the same to him exclude him from his duty in the premises, because while the performance of the contract by Clark is, in all respects, clearly within the umpirage of the Chief Engineer, the amount of payments is not embraced in this language and not re-
209 ferred to that officer.

But whether this be so or not, the Chief Engineer did not, in point of fact, embrace or refer to these nut locks in his final estimate or certificate, or otherwise include them in umpirage or decision under the contract except as follows: The Chief Engineer's estimate contains, however, the following credit to the Contractor Clark:

"For increased weight of iron in J. T. Clark's splices furnished over the weight represented to the contractor, at the time the contract was entered into, as per statement attached, marked B 5, as follows:

210	620,490 pounds at $1.65	$10,238 08
	Freight paid on same	632 89
	Total	$10,870 97 "

In statement B, which is a list of "Items to be added to the Heman Clark contract," is the following:

"For increased weight of iron in J. T. Clark splices furnished, over the weight represented to Contractors, at the time the contract was entered into, 620,490 lbs. at 01.65/100..... $10,238 08
For freight paid on same ..... 632 89 "

B 5 is a letter dated Milwaukee, February 24, 1888, addressed to Chief Engineer Whittemore by Division Engineer Carpenter, as follows: 211

"The following statement will show you the number and weight of angle bars used on the Kansas City Line, also difference in weight of the same angle bars, figured on a basis of fifty-two pounds per pair:

Total number charged.	Total weight.
165,167	4,914,832 lbs.

Total number charged.	Total weight @ 52 lbs.
165,167	4,294,342 lbs.
Difference in weight	620,490 lbs.
Difference in cost	$10,238 08
Freight on 620,490 lbs.	632 89
Total	$10,870 97 "

212

I cannot help concluding from this statement that the nut locks were not intended to be included in the words "Splices and Bolts of the J. T. Clark Pattern," although if the sixth section were left out of consideration, the testimony in the case would leave the mind in doubt whether it was originally intended to require the payment for the nut locks by the contractor or not.

There is much conflict in the testimony, particularly between Whittemore and Hegeman, but I think I am relieved from deciding upon the weight of this evidence by the consideration growing out of the sixth article of the contract and the action of the Chief Engineer under it. 213

SECOND ITEM. FORFEITURE FOR NON-PAYMENT IN TIME.

By the terms of the contract as modified before execution and noted in the *testatum* clause, the amount of money to be paid for the work to be done by Clark was $3,954,600.

The defendant claims that by a supplemental agreement entered into between them, this provision

214 was modified so that if the railroad were not completed by the first day of June, 1887, the forfeiture of a deduction of $40,000 from the contract price should be imposed upon the plaintiff; or, in other words, that the contract price should be reduced by the sum of $40,000.

The existence of any such supplemental contract is denied, but after much consideration of the testimony on both sides, I believe the defendant to have established this proposition, and that there was such an agreement under which the road was built, and that it was supported by a valuable consideration, and that if there were nothing else in the cause it would be my duty, in conformity with the receipt
215 hereinafter mentioned, executed by Clark for the amount after making this deduction, to award this issue against the plaintiff. But the completion of this railroad by the first of June, 1887, depended upon the action of both parties. By the terms of the contract the right of way was to be furnished by the Company, and if such right of way were not furnished in time to enable Clark to complete the road by the first of June, 1887, then clearly this forfeiture is non-enforceable. Such appears to have been the fact.

The twelfth article contains the following provision:

"For and in consideration of the payments, cove-
216 nants and agreements of the party of the second part to be by said second party made, kept and performed, as hereinbefore set forth, the party of the first part hereby covenants and agrees to furnish, at its own cost and expense, and at such time or times as not to delay the execution of the work in this agreement mentioned and referred to, all the lands now or hereafter marked out and designated by the said first party's Chief Engineer, for a right of way, borrow pits, waste banks and station grounds of all kinds as the said lands may be required for the construction of the railroad covered by this agreement."

It appears that at a point called Minnaville, the proposed railroad crossed the road of the Hannibal

and St. Joseph Railroad Company, and that, in 217
order to enable the contractor to build the crossing as he was bound to do under the contract, it was necessary for the two companies to agree upon the crossings, and that, in making such agreemeut, a diversion or change was made in the line of the Chicago, Milwaukee and St. Paul Road, so that when built, the Chicago, Milwaukee and St. Paul Road did not at this point occupy the place intended when the contract was executed, but a different and changed or modified line was agreed upon between the two companies for their mutual convenience, and the road constructed upon the same.

This had the unavoidable effect to delay the doing of his work by Clark. He could not construct the 218
crossing until the contract between the two companies had been adopted and executed.

A question is made in the case founded on a letter from Kimball to Hegeman, dated February 3, 1887, to the effect that the Minnaville crossing had been definitely settled, and that the contractor could go at it at any time in the spring.

This letter must, however, have been written under a mistake or misinformation.

The letter of Hegeman to Kimball, dated the 1st of February, says that the contractor was earnestly desirous of going at the work at once. The grading in the immediate vicinity had been nearly finished before this time. Hegeman testifies that the de- 219
fendant company fought for the crossing, as he expresses it, a year and a half (Stenographer's Minutes, p. 28). He also says that the right of way was not procured until the latter part of October, 1887 (do., p. 29).

There is nothing to contradict these statements, and the date of the execution of the contract for the crossing between the two companies strongly supports them; indeed, renders their accuracy certain.

Mr. Kimball himself says that there was --

"quite a long delay in regard to the grading and crossing of the Hannibal and St. Jo. road at Hannibal" (do., p. 672).

220 The profile shows that the last of the main work on both sides of the Hannibal crossing was done on November 15, 1886, excepting two small fills, March 15, 1887, and April 15, 1887 (see Profile, Stations, 1380–1410).

The contract between the two railroad companies is, however, in evidence. It was executed upon the 27th day of October, 1887. The plat of the new line attached to it bears evidence on its face that this tracing was prepared on the 8th day of August, 1887, and, although the execution of the contract and the making of the plat may have been in pursuance of a prior verbal agreement, there is no proof of this, and the presumption is that the parties did not
221 reach a conclusion which would enable the crossing to be constructed until the date of its execution by the two companies.

Before that time the Hannibal and St. Joseph Railroad Company could have prevented the completion of the road, according to the contract, at this point.

It is, therefore, reasonably certain that the delay in completing the crossing at Hannibal was owing to the inability of the two companies or their engineers to fix the terms of crossing at an earlier date.

This difficulty, however, having been removed by the execution of the contract of October 27, 1887, Clark finished the crossing in November, 1887.

222 But all doubt is removed as to this question by the records of the company itself, which are embodied in Plaintiff's Exhibit 51, introduced in evidence on June 6, 1896, which purports to contain—

"A statement giving dates when the right of way on the Kansas City extension of the Chicago, Milwaukee and St. Paul Railway was purchased, as appears from records in the office of the said railway company."

This exhibit, as shown by the stenographer's minutes (p. 938), was furnished by the defendant company in answer to a call by the plaintiff; being,

therefore, evidence produced by the defendant of 223
the contents of its own records, it is of the highest value.

On page 27, under the head of "Clay County," this record contains the following statements:

"Stations 1382-1419 x 29, July 18, 1886, part of this right of way was for change of location of the Hannibal and St. J. R. R.; station 1384–1404, October 27, 1887, lease from H. & St. J. R. R."

This settles beyond doubt the question as to who was chargeable with the delay in failing to complete the road in June.

The railroad could not have been completed until the crossing of the Hannibal and St. Joseph's Rail- 224
road had been procured.

This was not procured until October.

The contractor could not build the crossing until October.

However blameworty he may have been for other delays, he is not responsible in law for not having built this crossing sooner, and therefore, not liable to the forfeiture of $40,000 for not completing the road in June.

The Railroad Company was not, therefore, entitled to a credit of $40,000 on this account, and no judgment of the Chief Engineer, had there been any, could give it such right. Its further right, if any, must depend upon the concession made by Clark in 225
signing the receipt hereafter to be alluded to, the consideration of which, as it embraces both nut locks and this item of $40,000 forfeiture for not completing in time, has been deferred until now.

CHIEF ENGINEER'S CERTIFICATE AND ESTIMATE.

In accordance with the obligations contained in the Fifteenth Article of the contract a certificate of D. J. Whittemore, Chief Enginner of the Railway Company, bearing date March 3, 1888, was made and presented to the Railway Company.

226 This certificate certifies

"that the statement herewith attached is the final estimate of the amount and value of work done and materials used by Heman Clark, in building the Kansas City line, from Ottumwa, Iowa, to the Missouri River Bridge Abutment to Randolph Bluffs, Missouri, under his contract with this company, dated March 6, 1886, including all extra work done by said Clark, and that the said railroad agreed to be built in and by said contract has been by said Heman Clark constructed, built, completed and finished, in all respects, in full conformity with the agreements of said contract, except as the said railway company, party of the first part, has, by agreement with the said Clark, assumed the construction and completion thereof, and the compensation
227 therefor agreed upon has been deducted in said estimates from the amount which would have been due and owing to said Clark had he completed all of said work."

The estimates are quite voluminous, but as they are not the subject of dispute in this case, except in the particulars hereinbefore referred to need no extended consideration here. They amount in all to $3,895,789.75, credited to Clark and debited to the Company.

To this statement and to all its parts no objection is made by Clark, and it may be taken as settled in this case that the cost of the railway to the Company was the sum just mentioned, the only question
228 left being, therefore, how far, at the date of this certificate, payments had been made, or the Company was entitled to credits on this account.

The residue of the Chief Engineer's statement is is as follows:

"In making monthly estimates and in this final estimate no deduction has been made for any part of the $50,000 mentioned in Section 4 of Article 13 of the contract, and the amount in that article specified should be charged against the estimates as made.

I am also informed that a contract, subsequent to the original contract, was made, by which $40,000

was to be deducted from the contract price in case 229
the work was not completed by June 1, 1887, instead of August 1, 1887, as specified in the contract.

The work was not completed until after August 1, 1887, but no deduction of said $40,000 has been made in the estimates.

Separate amounts for these amounts are made and herewith returned."

It appears, therefore, with regard to the items of the cost now under consideration, that no reference was made by the Chief Engineer to the subject of nut-locks in making his final estimate, nor any other estimate than that of a statement upon hearsay as to the $40,000 now claimed by the Company 230
by way of forfeiture for non-performance in time.

These facts furnish further reasons why I cannot treat either of these subjects as being within the umpirage clause of the 21st article of the contract.

Indeed, so far as nut-locks are concerned, they are so entirely outside the contract, as I construe it, that I am at a loss to see how a decision of the Chief Engineer, if one had been made, would bind the parties upon that subject.

His umpirage is as to those points within the contract and not as to items furnished by the defendant (not the plaintiff) and for which a credit is claimed by the defendant outside the contract.

The proper amount of credit to block is settled by 231
the Chief Engineer's certificate at the sum of $3,895,789.79, and no more, and this is admitted to be correct.

It is proper to add here that neither this certificate nor a copy was, apparently, furnished to Clark. The contract does not seem to require it.

The contract provides, Article 2, Section 15, in the form of an agreement by the company, that—

"Whenever the Chief Engineer shall furnish to it, the said first party, his certificate that all the stipulations and covenants in this agreement contained to be by the said second party kept and performed, have been by said party well and truly ob-

served and carried out, and that the said first party's railroad herein proposed agreed to be built, has been by the said second party constructed, built, completed and finished in all respects in full conformity with the agreements hereinbefore in that behalf made by the said second party, and shall with said certificate also present his, the said Chief Engineer's, estimate of the amount and value of the various kinds of work done by the said second party under the terms of this agreement, which said estimate shall be final and conclusive between the parties hereto, then the said first party shall and will pay to the said second party the sum or sums of money, if any, shown by said final estimate to be due by said second party under the terms of this agreement, and will also pay so much of the sum of $500,000 theretofore retained by said first party as has not been previously paid to the said second party, provided that the entire amount of compensation so to be paid to the said second party, as in this article provided, shall not exceed the sum of $3,954,600."

Taking the amount certified in this final estimate and certificate at Milwaukee, March 3, 1888, of $3,895,789.79 as established and beyond question in the case, the only remaining question arising upon this part of the first count is whether the same has been paid to Clark or not, or legally satisfied otherwise.

That it has been paid in cash is not asserted, but the defendant's claim is that a smaller sum was paid to Clark on the 9th of March, 1888, in full discharge of this amount, and this claim remits us to the consideration of .

THE RECEIPT AND CHECK OF MARCH 9, 1888.

On March 9, 1888, Clark was presented for signature with the following receipt, reciting:

"Whereas a final estimate has been made by D. J. Whittemore, Chief Engineer of the Chicago, Milwaukee & St. Paul Railway Company, of all the work done and materials furnished under the contract made between said Railway Company and Heman Clark, bearing date March 6, 1886, for the

construction of the railroad from Ottumwa, in Iowa, 235
to the Missouri River, including all extra work performed and material furnished of every kind and description, which estimate with prior monthly estimates less deductions made for work not done and work assumed by the company amounts to $3,895,-789.39;

And whereas, the further sum of $34,698.90 should be credited to said Clark for materials sold by him to said company, and certain rebates and other matters of that description, making with the amount of said estimates the sum of $3,930,397.69;

"And whereas, the said Chicago, Milwaukee and St. Paul Railway Company has paid the said Clark to apply on said contract in money, material, labor and transportation, the sum of $3,626,865.20 (I interrupt the reference to this receipt to inject the remark here that in this sum of $3,626,865.20, is 236
included the sum of $9,558 63 for nut locks).

"And whereas, by the terms of Section 4, Article 13 of said contract said Clark was to be charged in addition to transportation, the sum of $50,000, and by a supplemental contract was to allow said railway company, by way of forfeiture in case said railway was not completed by the first of June, 1887, the further sum of $40,000, making the amount paid on said contract, together with the allowance of said transportation and the allowance of said forfeiture, the sum of $3,716,865, leaving however still due said Clark on said contract the sum of $213,-562,49."

The receipt then proceeds to recite an agreement that the sum of $40,000 should be deducted from 237
the payments to Clark to meet liabilities which the Railway Company had been or might be subjected to on his account, for which he was liable, which is a matter of subsequent consideration in this report.

The receipt continues:

"Which $40,000 deducted from the said sum of $213,562.49, so as aforesaid due said Clark, leaves due and owing by said Railway Company and now payable on said contract to said Heman Clark, the sum of $173,532.49.

Now, therefore, be it known, that I, the said Heman Clark, have received of and from the said

238 Chicago, Milwaukee and St. Paul Railway Company, the sum of $173,532.49, in full satisfaction of the amount due me on said estimates and in full satisfaction of all claims and demands, of every kind, name and nature arising from or growing out of the said contract of March 6, 1886, and of the construction of said railway, excepting the obligation of said Railway Company to account for said $40,000 as hereinbefore provided."

This receipt was sent to Clark by Vice-President Bond, with the information that upon its signature and return to him a check would be delivered to Clark for the sum of $173,532.49.

Clark signed the receipt, and at a later hour dur-
239 ing the day received the check, and thus, as far as he could legally bind himself for the consideration recited in this paper, Mr. Clark accepted the sum of $173,532.49 as in full, except as to the sum of $40,000 reserved to meet his guaranty recited in the receipt, and as far as his agreement and signature could give it force agreed and accepted these amounts as establishing that he had no claim for nut locks and had credited the Company with $40,000, because of the non-completion of the railway by the first of June, 1887.

I dismiss, as of no value in this consideration, the claims that Clark signed this receipt improvidently and without due consideration. He is bound by it
240 so far as he could legally bind himself from retraction, quite as much as if he had taken days for its consideration, been advised by counsel, and was under no pecuniary stress pressing him to accept a smaller sum than was due.

But was he bound? It has already been shown that, except this receipt, he was not; that the receipt amounted to a concession or gift by him to the Railway Company of two sums of money due him, viz., $9,558.63 for nut locks, and $40,000 for a time forfeiture, which was not enforceable against him, having been the result of the fault of the company, and not his own.

The payment of a smaller sum in discharge of a 241
greater is not held in the State of New York to be a sufficient consideration so as to create a binding obligation in discharge of a liquidated claim.

The claim of Clark against the Company for the sum of $3,930,399.69, was a liquidated sum, liquidated by the umpirage of the Chief Engineer as proved by the final certificate and estimate, and by this receipt prepared by the Company.

According to the laws of the State of New York, it could not be discharged by the payment of a smaller sum.

Had it been an unliquidated or disputed claim, or a claim upon a *quantum meruit* requiring a valuation of worth or material, different considerations 242
might apply, but these are, properly speaking, undisputed claims.

They are claims which the Company had no right to dispute, and the written concession contained in this receipt by Clark was based upon no consideration whatever.

So far as the nut locks are concerned, it is clear to me that they had been skipped or omitted, probably forgotten in the preparation of the original contract.

So far as the time forfeiture is concerned, irrespective of any question as to whether a forfeiture is anything more than a rod in pickle or claim held *in terrorem*, where it is not described as liqui- 243
dated damages, but considered in this case as being in its essential nature and character, liquidated damages, as I believe it was intended to be, the fact that the Company's breach of its contract to furnish the right of way in time relieved Clark from his liability made the claim for $40,000 by it in point of fact worthless and non-enforceable.

It is a matter of no consequence by what name the agreements entered into between the parties as evidenced by this receipt are called. It may be called accord and satisfaction or stated account, or by any other title known to the law. The result is

244 that a claim not existing in law or fact was admitted by Clark with as much binding force as he could impart to it by his signature, and, as the claim was without consideration of any kind, but was a simple, uncompensated surrender of lawful rights on his part, I am unable to resist the conclusion that he stands to-day as to these items in the same legal position as if he had not executed this receipt, by whatever name it may be designated.

I therefore decide as to this part of the case that Clark is entitled to recover these two sums amounting to $49,958.63, with interest from March 9, 1888, for moneys due him certified and allowed by the Chief Engineer's final estimate and certificate but not
245 paid by the Company.

THIRD ITEM.

The receipt contains the following passage, which has been briefly commented upon heretofore, viz.:

"And whereas, in and by said contract it was provided that the said Heman Clark, party of the first part, should save the said Railroad Company free and harmless from all claims that might be made against said Railroad Company for liens of workmen and claims of subcontractors, and from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle, and from all damages for cattle or other domestic animals killed or injured, and from all damages suffered by sub-
246 contractors and employees while engaged upon said work, of which said class of claims about $40,000 in amount have been made upon and are now pending in courts by divers claimants against said Railway Company and the sum of $40,000 of the amount so due as aforesaid under said contract to the said Heman Clark has been reserved and set aside by said Railway Company as indemnity or security for the payment of said claims and of such other claims of the same class as shall hereafter be made in case said claimants or any of them recover judgment against said railway company, and the said $40,000 or the balance thereof after paying and settling such claims as may be established against said Railway Company is to be paid over to the said

Heman Clark as soon as said claims are satisfied or 247
said Railway Company suitably indemnified from any losses on account of the same."

There are two contentions under this:

I.

One for $19,000 paid September 30, 1891, for money paid by the Company in settlement and discharge of a judgment rendered by King & Wetherill for $22,787.98, August 22, 1889, against the company for moneys due by Clark to King & Wetherill as subcontractors, and for which the Railway Company was liable under the laws of Missouri.

The first section of the tenth article of the con- 248
tract is in the following words:

"SECTION 1. The party of the second part (Clark) further agrees to pay in full for all material by him furnished for the construction of said railway, and for all labor by him employed upon said work or any part thereof, and also to so contract for such labor as to retain for the money due therefor the amount of the board bills, if any, contracted during the performance of such labor, and to pay such board bills with the money so retained and to save the said first party free and harmless from any and every claim, demand or lien arising from or growing out of any act or thing done or suffered by said second party, his agents, servants and subcontractors, and his and their employees in, about or connected with the construction of the railroad 249
aforesaid."

It appears that King & Wetherill were subcontractors for the construction of about 22 miles of the railway. Their contract provided for compensation to be paid by Clark for the work which they should do at specified prices as classified.

Having completed their work, they filed a lien in accordance with the laws of Missouri for the amount claimed, and brought a suit against the Railway Company therefor in the Circuit Court of Clay County, Missouri, which suit was afterwards

250 remitted for trial to Andrew County, Missouri. Notice of this suit was given to Clark, and he requested to defend it. Thereupon he agreed to defend it and requested the counsel of the Railway Company to employ its counsel at Kansas City to undertake such defense, which was done, the Railway Company being the sole defendant in the action.

After a long litigation, the cause having been referred to a referee by consent, judgment was rendered as above stated, whereupon an appeal was taken, a bond given by the Railway Company in the sum of $50,000, to perfect the appeal, the appeal remained pending for about two years, when the
251 time came for printing the record in order to enable the cause to be heard in the Supreme Court of Missouri, the attorneys in charge of the case applied to Clark for the money necessary to print the record, which he failed to pay.

A negotiation for settlement was pending, which finally resulted in an offer by King & Wetherill to settle at $19,000. This was reported to Clark, who refused to pay more than $15,000. Clark failed to print the record. Thereupon the attorneys in charge of the cause informed the general counsel of the Railway Company at Milwaukee of the situation, and they telegraphed to Clark, September 14, 1891, that $19,500, including $500 expense of counsel,
252 was the best that could be done in the way of settlement, and that unless the money were sent to print the the record and the Company indemnified against the claim under the judgment and the expense of prosecuting the appeal, they would settle for the amount stated, and charge the same to Clark.

No response to this telegram was received, whereupon the Railway Company, on September 30, 1891, paid the $19,000 through the attorneys in charge of the cause, and procured the satisfaction of record of the judgment, and also paid to those at-

torneys for their expenses, disbursements and com- 253
pensation $500.

At this time the amount due on the judgment, with interest to the date of payment, was $25,674, so that the amount paid was $6,174 less than the amount due upon the judgment.

In my opinion the action of the Company in this matter was justified by the facts. The judgment is certainly *prima facie* evidence of the amount due. It was advantageously settled. The omission of Clark to furnish the moneys for printing the record justified the Company in entering into the agreement of settlement rather than to pursue the appeal at their own expense.

There is nothing in the case whatever to show 254
that this claim would not have been successful in the Appellate Court.

Clark, through his agent Hegeman, had previously offered to pay $17,000.

The counsel for the company who examined the case notified Clark, September 14, 1891, that—

"there is now due on the judgment of King & Wetterill, including interest and costs, over $25,000. The chance for reducing this amount on appeal is very slight. I can settle the case now for $19,500, if accepted to-day. I advise settlement. What shall I do? Answer quick."

To this the answer came that Clark would not pay 255
over $15,000.

On September 15th, Clark was advised by telegram by counsel for the Company, as follows:

"You must send money to pay for printing and send bond to indemnify the Company or the Company will settle and charge you the amount paid. The Company cannot take the risk of having a charge of $26,000 or $27,000, including interest and costs, entered against it on appeal."

To this final telegram there was no response, and the settlement was made fifteen days later.

256 II.

This is a claim by the Company that on the 15th of August, 1890, it paid the sum of $1,695.30 in settlement of a judgment recovered by G. A. Van Gant, administrator of Dennis Murphy, deceased, including interest and costs on account of the death of testator, which judgment was recovered for the sum of $1,500, February 16, 1889.

As to this claim the Company's solicitor notified Clark, January 14, 1889, that the suit was pending, enclosing a copy of the papers, and notifying him that the Company would hold him responsible for any judgment that might ultimately be obtained in the case, together with costs and expenses, should
257 he fail to assume the expense.

The third section of Article 17 of the contract provides that—

"In case any accident shall occur on or to any train, engine, car or cars of the Railway Company while the same are running on any portion of the railroad agreed to be constructed before the aforesaid portion of said railway shall be turned over to or accepted by the Railway Company, then and in every such case the contractor shall alone be responsible for all loss, cost and damage caused by said accident, unless the same should have resulted from the defects of the motive power or cars of the Railway Company."

258 Murphy was a brakeman on a construction train and was killed, during the progress of the work, while in the service of the Railway Company.

There is no evidence whatever that his death resulted from defects in the motive power or cars of the Railway Company.

The testimony in the case is meagre, but it does show that Murphy was a brakeman employed in the service of the Company on the line of the railroad while in the course of construction.

This brings the case within the provision that in case of loss by accident, the contractor shall alone be responsible, as provided in the third section of

Article 17 of the contract, and I am, therefore, 259
compelled to award, although I should have been glad if the testimony had been fuller, that the Company is entitled to this credit.

SECOND COUNT.

Second Cause of Action.

To this cause of action is to be referred the testimony given to sustain the plaintiff's claim to recover large sums for

"quantities of work in excess of that called for by the said contract,"

260

and material and structures,

"more in number and of a more expensive design than that called for in the plans and specifications under said contract at a largely increased cost to the plaintiff above that called for in the contract."

This claim is, I think, disposed of by the contract itself.

The contract was for a lump sum of $3,954,600 and no part of the work provided thereby was classified or to be measured separately and paid for by measurement.

It was an entire compensation for an entire work.

In order that the plaintiff should recover under 261
this cause of action, it is necessary for him to show that the contract excluded the items claimed by him, but while the agreement does specify in large measure the extent of work and materials, in another large measure it leaves the same to be directed by the Chief Engineer. As, for instance, one of the items most insisted upon in argument under this cause of action was for a greater length of Howe truss bridges, than it was supposed, at the time the contract was made, would be required.

Before the making of the contract profiles and estimates of the probable measurement of the work

262 were prepared and shown to Clark, not by way of guaranty, or as the basis of agreements different from those contained in the contract, but by way of information to enable him to bid intelligently.

They did not profess to be more than approximate statements, but they did assume to foresee and estimate the probable number of lineal feet of Howe truss bridges.

The fourth item of the third article of the contract is in these words:

"The party of the second part further agrees to furnish all the material for and to construct and erect all such other truss bridges and all such pile and trestle bridging as the said party of the first
263 part may require in and upon the aforesaid line of railway. All such truss bridges shall be of the Howe truss pattern and they, together with all pile and trestle bridges, shall be in accordance with the said first party's standards for such structures respectively, and in number, length and location shall be such as the Chief Engineer may designate, and all the material and workmanship in any wise pertaining to such structures or any of them, shall be furnished and performed to the satisfaction and acceptance of said Chief Engineer."

Unless there were something to specify the number of Howe truss bridges and their length the foregoing provision is controlling. It put the contractor upon notice that this part of the work was
264 to be done as described in this section, and was not governed by any statement approximate or otherwise of numbers and lengths of bridges. He made his contract at his peril. So far as this and other portions of the work of like character are concerned he agreed to do the work not upon accurate specifications of the number and length of bridges, but in submission to the provision that the Chief Engineer should in "number, length and location" "designate."

Either, therefore, these truss bridges and the large amount of extra grading and other materials which are covered by this and other portions of the con-

tract of like character were to be done, not under 265
the limitations of the approximate estimates, but of the judgment of the Chief Engineer, to be exercised from time to time, in doing the work in the construction of the railroad, or in the alternative, this extra length of bridging and the extra grading of which it is claimed there was a very large quantity, are within the third section of the 16th article in the following words:

"It is further mutually understood and agreed by and between the said parties that in case the said second party shall be by said Chief Engineer required in writing to furnish any material or do any work not hereinabove required of and agreed to be furnished by said second party, or in case the said second party shall, in like manner, be required by 266
the said Chief Engineer, to furnish and erect any structure of a more expensive design or plan than that called for by the standard plans of said first party and hereinabove by said second party agreed to be furnished and erected, then and in every such case the said second party shall furnish such material or do such work or shall furnish and erect such more expensive structure as aforesaid, as the case may be, and shall receive from the said first party such just and reasonable compensation for such material or work or for such more expensive structure so as aforesaid required of him as the said Chief Engineer shall fix and determine."

No proof has been given of any such requirement in writing by the Chief Engineer, or to sustain 267
the claim, if it were made, that the items embraced in the second cause of action were in their nature extra work governed by this clause of the contract.

Without, therefore, enlarging upon this part of the case, or going into detail as to the items for which recovery is claimed, it seems to me that we are compelled to adopt one of two conclusions: either that these items were within the language of the contract, and for which the round sum of $3,954,600 is payable, although they must have been anticipated by the contractor when he entered into the same, or they are not within the contract, but

268 are in the nature of extra work, for which no written orders are produced. In either case the plaintiff fails to establish a case for recovery, and judgment must be against him as to anything relied on by him in the second count or cause of action.

THIRD CAUSE OF ACTION.

The third cause of action is a claim to recover $2,196 for cost of transportation of ties and rails, other track material and bridge timber rendered necessary to be paid by the plaintiff because of the non-performance of the defendant's contract to furnish the right of way during the months of September and October, 1887.

269 The specification of this claim of the plaintiff's cause of action in the bill of particulars is in these words:

"Freight charge on ties and rails and other track material and bridge timber shipped from Lawrence, Missouri, to Minnaville, and other points near Kansas City during September, October and November, 1887, to lay track and complete bridging south of crossing of Hannibal and St. Joseph Railroad, near Minnaville, in consequence of failure of railway to secure right of way about October 20, 1887, $2,196."

I do not find that the provision of the contract (Article 13, Section 4) required the Railroad Com-
270 pany to transport materials, machinery, implements, tools, teams and contractor's supplies over the line of the railroad further than

"to the end of the track thereof wherever such end may be when said transportation is required."

Any other transportation might have been convenient to the plaintiff or to both parties but was not required by the contract to be paid for by the defendant.

The freightage of materials over the Wabash road, which the plaintiff considered necessary in order to enable him more rapidly to complete the line below

the Minnaville crossing does not, therefore, come 271
within the language of the contract, which limited the liability of the Chicago, Milwaukee and St. Paul Railway Company to the expense of transportation as far as the track had been laid and not to transport over another railroad for the purpose of assisting the plaintiff to construct an unconnected piece of road or the then unconnected residue of the railroad below the Minnaville crossing.

When the defendant Company transported as far as the line of track had been laid from Ottumwa south it did all which could be required of it.

After the crossing had been made at Minnaville, then an obligation was imposed by the terms of the contract to follow the completed track; but there 272
was no obligation to transport materials around the crossing in order to assist the plaintiff to do his work more rapidly than it otherwise would have been done.

I therefore adjudge that the plaintiff is not entitled to recover under the third cause of action.

Fourth Cause of Action.

The fourth cause of action is based upon a charge of fraud.

It avers that the defendant falsely represented to the plaintiff that the amount of solid rock was 119, 565 cubic yards; that there was no loose rock; that the amount of culvert timber, lineal feet piling, 273
lineal feet Howe truss bridging and number of bridge ties as stated in the said cause of action were the entire amount of work of that class to be done.

That the plaintiff entered into the contract relying on these statements and believing them to be true.

That thereafter the plaintiff was compelled to do and perform much more labor than that as thus anticipated and represented, whereby he suffered great loss and damage.

No proof whatever has been given to sustain this charge of fraud. All that the proof amounts to is

274 this: That before the work was done and before the contract was let certain measurements and estimates were made by the Company showing approximately in detail the quantities and amount of work which it was then believed would be necessary in building the road; but this was not a contract in performance of the work in detail or by amounts of classified work. It was a lump contract into which the plaintiff entered at his peril. He could have declined to make the contract. He could have insisted that if it were made the Company should guarantee the approximate estimates as actually accurate; but nothing of this kind was done. The contract itself bound him—

275 "to furnish all the material for and to execute, construct and finish, in every respect, in a most substantial and workmanlike manner, all the work hereinafter specified and required by said first party to be done in the construction and completion of said first party's line of railroad extending as aforesaid from a point in the City of Ottumwa, Iowa, to Harlem Station, in Clay County, Missouri, a total distance of $202\frac{8}{10}$ miles."

And again, the contract provided, in Section 3, of Article 1., thus:

"The party of the second part further agrees that all the material and workmanship required by said first party to be furnished or performed in or about
276 the work hereinbefore mentioned and hereinafter particularly specified and set forth, shall be furnished and performed in strict accordance with the rules, regulations and specifications therefor now made or hereafter to be made by the said Chief Engineer and in all respects to his satisfaction and acceptance."

The first section of the second article required the grade of the road to be—

"in conformity with the grades drawn on a certain profile of the line * * * but said Chief Engineer shall have the right to change the grade or grades now drawn thereon wherever such change shall in

his opinion, be necessary in order to keep said road- 277
bed above high water, and in any and every such case the party of the second part agrees to build the said roadbed upon the new grade so as aforesaid changed."

It is unnecessary to follow this contract into the extreme detail amounting almost to a repetition of the contract itself, which would be necessary to show with what painstaking and careful specification, the contract required the performance of the work by the contractor Clark.

These provisions together with the stipulation for extra work already quoted make a contract which has been fully performed by Clark (except so far as 278
varied by the waiver of the parties), which if it were permitted to disregard upon the charge of fraud in this cause, must, nevertheless, in order to be overthrown for any such reason, be shown to have been intentionally and purposely so drawn or accompanied with such known false representations as to render the requirement that the plaintiff should execute it unfair on the part of the company.

Nothing of this kind is shown. The extent to which the testimony has gone is that in the execution of the contract work was imposed upon the contractor as to which he now says that it was not expected of him when the contract was made; for instance and to illustrate, the two largest items as 279
shown by the bill of particulars of this class of work consist of a large increase of embankment for which the plaintiff claims $89,833.33⅓, which the bill of particulars states was extra embankment beyond that shown on the plan and was filling required in excess of that called for by the contract.

Other items are 28,855 cubic yards embankment in excess of cross sections shown on King & Wetterill *vs.* C. M. & St. P. Ry. Co. and Heman Clark at twenty-three cents, $6,630.35, 877 lineal feet. Howe truss bridge built in excess of those shown in schedule of quantities, $16,400; other quantities in excess of

280 those shown on schedules as follows: 18,486 cubic yards rock at $1.20, $22,183.20; 90,133 cubic yards loose rock, at fifty cents, $45,066.50; 963,589 feet board measure culvert timber at $25, $24,089.73; 31,632 lineal feet piling $10,761.68; 291,840 feet board measure oak bridge ties at $35, $10,214.40; false work for 877 linear feet Howe truss bridges $4, $3,508; 16 section houses $1,600.

It has already been shown that, according to the terms of the contract all this was either work done under the contract or extra work, and that upon the second cause of action, which follows and does not attempt to disregard the contract there can be no recovery.

281 Under the cause of action now under consideration there might be a recovery perhaps in this case for some or more of these items, but only on the theory that as to them there had been false representations amounting to fraud, either in inducing the plaintiff to enter into the contract, or in its performance.

Without stopping to consider whether in the same action there can be a recovery upon the contract and also on the ground that the contract was made or performed by the adversary fraudulently, it is enough to say that there does not appear to be any testimony whatever to justify the claim that either in making or performing this contract, the Railway
282 Company or any of its employees intended to wrong the plaintiff.

The charge is of the gravest and serious nature.

The testimony, in order to sustain it, ought to be explicit and direct, or circumstantially decisive of this wrongdoing.

As I find nothing of the kind in the proof, it is my opinion, and I so award, that the plaintiff is not entitled to recover upon this count.

Fifth Cause of Action.

The fifth cause of action charges that in June, 188 , plaintiff was the owner of 97,000 feet board

measure bridge timber, of the value and reasonably worth the sum of $2,425, which timber had been brought and placed upon the line of work for use in completing the said contract, and that the defendant, without the knowledge and consent of the plaintiff, wrongfully took possession of the said timber and converted the same to his own use, all to his damage in the sum of $2,425, which, although demanded, has not been paid. 283

I was of the opinion, and so notified the counsel before the close of the hearing, so as to give the defendant ample opportunity to produce more testimony, if he desired, that this claim had been substantially made out.

This cause of action arose after the engineer's final certificate, after the signing of the receipt by Clark, is for an isolated act done by the defendant in an emergency, which, it was supposed, required the use of this timber in consequence of a washout. 284

It constitutes no part of the items, amounting in all to $34,598.90, enumerated in the receipt as credited to Clark—

"for materials sold by him to the said company, and certain rebates and other matters of that description."

This lumber was not sold to the company, but taken by it to meet an unexpected emergency.

The weight of the testimony seems to me to establish the claim of the plaintiff for payment for this material at the price of $2,425, with interest from the 30th day of June, 1888. The day in June upon which it was used not being fixed by the testimony, must be taken to have been the last day of the month. 285

SIXTH CAUSE OF ACTION.

The sixth cause of action is a repetition of the charge of fraud made in the fourth cause of action, the difference being this, that the fourth cause of action counts upon

286 false representations, the entrance into the contract upon faith that they were true, the performance of work in excess of the amount represented and loss or damage following such representations. The sixth cause of action is based upon fraud or negligence in the performance of the contract by which the company required the plaintiff to furnish embankment or filling in order to reach grades wrongfully, negligently and unskilfully given, to the amount of 385,000 cubic yards greater than was contemplated and required by the contract.

This claim is covered by what has already been said in this report. It may be said in addition to what is found herein, however, that upon the testi-
287 mony the conclusion is fair that the larger part, if not the whole of this supposed extra embankment, was required in order to meet the possibility of shrinkage.

This contract did not entitle the contractor to measure the grades from time to time as embankments were made, or to payment therefor without any consideration of subsequent settlement or shrinkage.

It is in accordance with the well-known law of nature that earth when taken from borrow pits or cuts and filled into embankments will shrink. The duty of the contractor was to have it at the standard grade at the time the work was accepted and
288 not at the dates prior to that time.

In order to meet this contingency which presents itself in almost every large job of work, engineers are in the habit of requiring contractors to throw up the earth in the first place to a higher grade than that which it is expected the embankments will attain and conform themselves to, after shrinkage and settlement and before final acceptance of the work.

I cannot find any sufficient ground to believe that the embankment upon this line of railroad at the date of its completion in the winter of 1888 were to any considerable extent above the grades called for

by the profile grades referred to in the second article of the contract. 289

The argument from the fact that King & Wetterill judgment against the railway company was based upon an increase of grade upon the twenty-two miles they built signifies nothing in this case.

Their contract was quite different from that here provided for. This was a lump contract binding the contractor to build to the grades drawn on the profile in the office of the Chief Engineer, who had the authority to change the grade whenever, in his opinion, the same might be necessary to keep the road bed at least one foot above high water.

Their contract contained a specification of grades which does not exist in this case, and this may apply to the whole case. 290

Even if it be otherwise, however, the extra grading would not be a wrongful and negligent performance of the contract by the company, but would be extra work which the plaintiff had a right to refuse to do unless ordered in writing, and which when done by him without such order, is conclusive evidence that he had waived the order in writing, and submitted to perform the work as done according to the terms of the contract.

Upon the whole case it is my opinion, and I award, that the plaintiff is entitled to recover the amount certified by the Chief Engineer of $3,895,793.79, without the deduction claimed by the defendant for nut locks of $9,558.63 and without allowance to the defendant by way of forfeiture for non-completion of the railway on the first day of June, 1887, said sums together, $49,558.63, being with interest from March 9, 1888, and is also entitled to recover for timber used by the defendant on the 30th day of June, 1888, to the amount of $2,425, with interest from June 30th, 1888, the whole amounting at the date of this report, viz., the fourth day of December, 1897, to the sum of eighty-one thousand three hundred and five $\frac{88}{100}$ dollars, for which, with interest from this date and disbursements, the plaintiff is 291

292 entitled to judgment, less amount paid by the defendant in excess of the reserved $40,000, $521.75 with interest from and to the same date, being in all this day $826.53.

There will be judgment therefore for the plaintiff for $80,479.35, with interest and costs, interest to be computed from December 4, 1897.

December 4, 1897.

GEO. HOADLY,
Referee.

Referee's fees, $5,000.

(Endorsed)—U. S. Circuit Court, Southern District of New York.—Heman Clark *vs.* Chicago, Milwaukee & St. Paul Railway Co.—Report of
293 George Hoadly, Referee—U. S. Circuit Court.—Filed Dec. 14, 1897, John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HEMAN CLARK

vs.

294 CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

The defendant excepts to the report and decision of Hon. George Hoadly, the Referee appointed to hear and determine the above entitled action, dated December 4, 1897, which finds and decides that the plaintiff is entitled to recover from the defendant the amount charged to the plaintiff for nut locks furnished by the defendant to the plaintiff, and used in the construction of the railroad referred to in the complaint.

II.—The defendant also excepts to the finding and 295
decision of the said Referee that the defendant Railway Company was not entitled to a credit of $40,000 charged to the plaintiff on account of his failure to complete the road contracted and agreed to be built by the first day of June, 1887.

III.—The said defendant also excepts to the finding and decision of the said Referee that the receipt or acknowledgment signed and executed by the plaintiff on the 9th day of March, 1888, whereby he acknowledged that the sum of $173,532.49 was received by him from the defendant Railway Company in full satisfaction of the amount due him on the estimates of the Chief Engineer of the defend- 296
ant company, and in full satisfaction of all claims and demands of every kind, name and nature arising from or growing out of the contract of March 6, 1886, and of the construction of said railway, was not an accord and satisfaction or a bar to the recovery by the plaintiff of the amounts charged to him for nut locks, as stated in the said Referee's report, or for the sum of $40,000 deducted or charged by reason of the failure of the plaintiff to complete the road agreed to be built by the first of June, 1887.

IV.—The defendant Railway Company also excepts to the finding and decision of the said Referee that the plaintiff is entitled to recover from the de- 297
fendant the sum of $2,425, with interest, for certain timber alleged to have been taken possession of by the defendant Railway Company in the month of June, 1888.

V.—The defendant further excepts to the said report and decision of the said Referee that the plaintiff is entitled to recover the amount certified by the Chief Engineer of the defendant Railway Company of $3,895,793.79 without the deductions claimed by the defendant for nut locks of $9,558.63, and without allowance to the defendant by way of forfeit-

298 ure by non-completion of the railway on the first day of June, 1887, and that the plaintiff is also entitled to recovers for timber used by the defendant on the 30th day of June, 1888, to the amount of $2,425, with interest from June 30, 1888.

VI.—The defendant also excepts to the finding and decision of the said Referee that the plaintiff is entitled to judgment against the defendant for the sum of $80,479.35, with interest and costs, as stated in the said Referee's report.

VII.—The defendant Railway Company also excepts to the refusal of the Referee to find as re-
299 quested and stated in the first request to find asked for by the defendant upon the trial of this action.

VIII.—The said defendant also excepts to the refusal of the said Referee to find and decide as requested by the defendant upon the trial of this action in and by the 10th request to find, as asked by the defendant of the Referee upon the trial of this action.

IX.—The defendant also excepts to the refusal of the Referee to find and decide as requested by the defendant in and by the 12th finding or request asked and requested by the defendant of the said
300 Referee upon the trial of this action.

X.—The said defendant also excepts to the refusal of the Referee to find and decide as requested by the defendant upon the trial of this action, as stated in the 14th request made and asked for by the defendant upon the trial of this action.

XI.—The defendant Railway Company also excepts to the refusal of the Referee to find and decide, as requested by the defendant upon the trial of this action, as stated and contained in the 17th find-

ing requested to be made by the defendant, as afore- 301
said.

XII.—The defendant also excepts to the refusal of the Referee to find and decide, as requested by the defendant upon the trial of this action, as contained and stated in the second conclusion of law asked and requested by the defendant to be made by the said Referee upon the trial of this action.

XIII.—The defendant also excepts to the refusal of the Referee to find and decide, as contained and stated in the 3d request or conclusion of law asked and requested to be made by the Referee upon the trial of this action. 302

XIV.—The defendant also excepts to the refusal of the Referee to find and decide, as contained and stated in the 6th request or conclusion of law asked and requested to be made by the Referee upon the trial of this action.

XV.—The defendant also excepts to the refusal of the Referee to find and decide, as contained in the 7th request or conclusion of law asked of the Referee on the trial of this action.

Dated December 15, 1897.

BANGS, STETSON, TRACY & MACVEAGH,
Attorneys for Defendant, Chicago, 303
Milwaukee & St. Paul Railway Co.

(Endorsed)—U. S. Circuit Court.—Heman Clark *vs.* Chicago, Milwaukee & St. Paul Railway Company.—Exceptions to Referee's Report.—Bangs, Stetson, Tracy & MacVeagh, Attorneys for Defendant, 15 Broad Street, New York City, New York.—U. S. Circuit Court.—Filed Dec. 15, 1897.—John A. Shields, Clerk.

304 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

HEMAN CLARK

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

305 The defendant further excepts to the report and decision and to the findings or conclusions of fact and law of the Honorable George Hoadly, Referee, in this action, as contained in his report dated December 4, 1897, as follows:

I.—The defendant excepts to the finding, ruling or conclusion of law of the said Referee to the effect that the plaintiff, Clark, was not obliged to credit to the defendant company, by force of any provision of the contract referred to in this case, any amount for nut-locks furnished to the plaintiff during the construction of the railroad agreed to be built by said contract.

306 II.—The defendant also excepts to the finding and conclusion of the said Referee in his said report that the provisions of the contract between the plaintiff and the defendant Railway Company, quoted by the said Referee (Art. 15, Sec. 2), have no reference to the case of a credit to which the first party may claim to be entitled for materials not required by the contract to be furnished by Clark, the plaintiff, but which the defendant company actually supplied to him during the progress of the work.

III.—The said defendant also excepts to the finding, decision or conclusion of the said Referee that

it was not the right of the Chief Engineer of the defendant Railway Company to fix the amount of credits to which the defendant company was entitled. 307

IV.—The defendant company also excepts to the finding or conclusion of the said Referee that the provisions of Article 16, Section 3, of the contract between the plaintiff and defendant for the payment of extra work, have any reference to the matter of the claim in regard to nut locks mentioned in the report and decision of the said Referee.

V.—The defendant also excepts to the finding, decision or conclusion of the said Referee that the provisions of Section 1, of the 21st Article of the contract between plaintiff and defendant did not make the Chief Engineer of the Railway Company an umpire to settle questions of accounting between the parties. 308

VI.—The said defendant also excepts to the finding, decision or conclusion of the said Referee that nut-locks were not intended to be included in the words "splices and bolts of the J. T. Clark pattern," or that the plaintiff was not chargeable therefor under the terms or provisions of the contract between the plaintiff and defendant, and was not chargeable therefor by reason of the provisions of the Article 6th, Section , of the said contract. 309

VII.—The said defendant also excepts to the finding and decision of the said Referee that the right of way for the construction of the railroad agreed to be built by the plaintiff under the contract between the plaintiff and defendant was not furnished by the defendant Railway Company in time to enable the plaintiff to complete the road by the first day of June, 1887.

VIII.—It also excepts to the finding, decision and conclusion of the said Referee that the forfeiture of

310 $40,000 for not completing the said road by the first day of June, 1887, charged to the plaintiff and credited to the defendant, as stated in the receipt or acknowledgment signed by the plaintiff on the 9th day of March, 1888, is or was not enforceable.

IX.—The said defendant also excepts to the decision, finding or conclusion of the said Referee that the plaintiff was not liable to the forfeiture of $40,000 for not completing the railroad agreed to be built in and by the contract between the plaintiff and defendant by the first day of June, 1887, or in June, 1887.

X.—The defendant also excepts to the decision,
311 finding or conclusion of the said Referee that the receipt signed by the plaintiff Clark on March 9, 1888, for $173,532.49 "in full satisfaction of the amount due to him on the estimates, and in full satisfaction of all claims and demands of every kind, name and nature arising from or growing out of the contract between the plaintiff and the defendant, and of the construction of said railway, as stated in the said report of the said Referee amounted to a concession or gift by the said Clark to the defendant Railway Company of two sums of money due him, namely, $9,558.63 for nut locks and $40,000 for a time forfeiture, which was not enforceable against him, having been the result of the
312 fault of the Company and not his own."

XI.—The said defendant also excepts to the finding, decision and conclusion of the said Referee, as contained in his said report, that the payment of a smaller sum in discharge of a greater sum is not a sufficient consideration so as to create a binding obligation in discharge of a liquidated claim.

XII.—The said defendant Railway Company also excepts to the finding, decision and conclusion of said Referee, as stated and contained in his said report, that the claim of the plaintiff Clark against the defendant Railway Company for the sum of

$3,930,399.69 was a liquidated sum, and that the 313
sum was liquidated by the umpirage of the Chief Engineer of the defendant Railway Company, as proved by the final certificate and estimate and by the receipt prepared by the Company.

XIII.—The said defendant also excepts to the finding and conclusion of the said Referee, as stated and contained in his said report, that, according to the laws of the State of New York, the said claim could not be discharged by the payment of a smaller sum.

XIV.—The said defendant also excepts to the finding, decision and conclusion of the said Referee that the claims of the plaintiff in respect to the mat- 314
ters of the said nut locks and forfeiture or as to the claims made in this suit were or are undisputed claims.

XV.—The said defendant Railway Company also excepts to the finding, decision and conclusion stated in the report of the said Referee to the effect that the said claims are claims which the Company had no right to dispute, and that the written concession contained in the receipt signed by the plaintiff Clark was based upon no consideration whatever.

XVI.—The said defendant Company also excepts to the finding, decision and conclusion of the said Referee, as contained in his said report that the Com- 315
pany's breach of its contract to furnish the right of way in time, relieved the plaintiff Clark from his liability and made the claim for $40,000 forfeiture for not finishing the road by the first of June, 1887, bad in point of fact, worthless and non-enforceable.

XVII.—The said defendant Railway Company also excepts to the finding, decision and conclusion of the said Referee as contained in his report, that the claim of the Railroad Company in regard to nut-locks and forfeiture, was one not existing in law or fact.

316 XVIII.—The said defendant also excepts to the finding, decision and conclusion of the said Referee as contained in his said report, that although the claim in respect to the said matters was admitted by the plaintiff Clark with as much binding force as he could impart to it by his signature, the same was a simple uncompensated surrender of lawful rights on his part.

XIX.—The said defendant also excepts to the finding, decision and conclusion of the said Referee as contained in his said report, that the plaintiff Clark stands to-day as to these items before referred to, in the same legal position as if he had not
317 executed the receipt by whatever name it may be designated.

XX.—That said defendant also excepts to the finding, decision and conclusion of the said Referee as contained in his said report, that the defendant Railway Company wrongfully took possession of any lumber or timber of the value of $2,425 or any other sum belonging to the plaintiff, or that the defendant company took possession of the said timber, or that the said Railway Company converted any such timber to its own use, and that the plaintiff was entitled to payment therefor, as stated in the said report of said Referee.

318 BANGS, STETSON, TRACY & MACVEAGH,
Attorneys for the Defendant, Chicago, Milwaukee and St. Paul Railway Company.

(Endorsed)—United States Circuit Court, Southern District of N. Y.—Heman Clark *vs.* Chicago, Milwaukee & St. Paul Railway Company.—Defendant's further exceptions to Referee's decision and report.—Bangs, Stetson, Tracy & MacVeagh, Attorneys for Defendant, 15 Broad Street New York City, New York.—U. S. Circuit Court.—Filed Dec. 24, 1897.—John A. Shields, Clerk.

At a Term of the Circuit Court of the United States for the Southern District of New York, held at the United States Court House, in the City of New York, on the 4th day of February, 1898. 319

Present—Hon. E. HENRY LACOMBE,
Circuit Judge.

HEMAN CLARK

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY. 320

The issues in the above entitled cause having been referred by consent of the parties, by an order made by this Court entered therein on the third day of January, 1895, to Hon. George Hoadly, as Referee, to hear and determine the same, and the said Referee having made his report dated December 4, 1897, which was filed in the office of the Clerk of this Court on the 14th day of December, 1897, and the defendant having thereupon moved that the said report of the said Referee be recommitted to him, with directions to make separate and distinct findings of fact and conclusions of law as determined by him in this action, or for such other order as might be proper in the premises; and it appearing to the Court that the said report of the said Referee does not state his findings of fact and conclusions of law separately; now, upon the affidavit of Charles W. Bangs, one of the attorneys for the defendant, sworn to the 24th day of January, 1898, and upon the said report of the said Referee and the proceedings in this action in favor of the motion, and the affidavit of L. Laflin Kellogg, opposed; and after hearing Mr. C. 321

322 W. Bangs on behalf of the defendant, and L. Laflin Kellogg, Esq., on behalf of the plaintiff, and on motion of Messrs. Bangs, Stetson, Tracy & MacVeagh, attorneys for the defendant, it is

Ordered, that the said report of the said George Hoadly, Esq., Referee, be and the same is hereby recommitted and returned to the said Referee, with directions to make and state his findings of fact and his conclusions of law in this action separately.

It is further ordered, that either party have ten days after the filing of said Referee's report of his findings of fact and conclusions of law, and of service of a copy thereof with notice of such filing, to make and file or serve exceptions to the said
323 report, and to prepare and serve a bill of exceptions, with leave to either party to make such application thereon to the Court as they may be advised, and that all other proceedings in the action be stayed until the coming in and filing of the said Referee's report as aforesaid.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed)—U. S. Circuit Court.—Heman Clark *vs.* Chicago, Milwaukee & St. Paul Railway Company.—Order Recommitting Report of Referee, &c.—Bangs, Stetson, Tracy & MacVeagh, Attorneys for Defendant, 15 Broad Street, New York City, New York.—A copy of the within
324 has been this day received at the office of Kellogg, Rose & Smith, Feb. 1, 1898.—Kellogg, Rose & Smith, 120 Broadway, N. Y.—U. S. Circuit Court.—Filed Feb. 4, 1898.—John A. Shields, Clerk.

NEW YORK CIRCUIT COURT OF UNITED STATES 325

FOR THE SECOND CIRCUIT AND SOUTHERN DISTRICT OF NEW YORK.

HEMAN CLARK

AGAINST

CHICAGO, MILWAUKEE and ST. PAUL RAILWAY COMPANY.

326

REPORT OF GEORGE HOADLY, REFEREE IN THE ABOVE ENTITLED ACTION.

To the Honorable the Judges of the Circuit Court of the United States for the Second Circuit and Southern District of New York.

On the 3d day of January, 1895, an order was entered in the above entitled action by the consent of the parties appointing the undersigned, George Hoadly, Referee in this action in the place and stead of William G. Choate, resigned, and this action and all the issues therein were thereby referred to me as sole Referee to hear and determine the same. 327

In pursuance of the above entitled order, on March 11, 1895, I took the oath faithfully and fairly to try the issues and determine the questions submitted to me in the above entitled cause, and make a true report thereof, according to the best of my understanding, and thereupon on March 21, 1895, the trial of the cause began.

The argument was finally submitted to me upon September 9, 1897.

In arriving at what I deem to be just conclusions upon the issues between the parties, I do hereby

328 adopt and state the following findings of fact and conclusions of law, and each of them.

In addition to the findings of fact and conclusions of law adopted by me and stated in the following report I submit herewith a large number of findings of fact and conclusions of law requested by the plaintiff and defendant respectively, to be by me given, together with a statement of the disposition made of the same, by giving or refusing the same.

I take this course, although perhaps not necessary, in order to put the Court into more complete possession of the issues in the case as they were presented to me by counsel.

329 After the cause had been first disposed of, as I supposed, and my report made to this Court, and the Court had returned the same to me for further action, a large number of findings of fact, viz., thirty-seven, and of conclusions of law, viz., twenty-one, were proposed to me on behalf of the defendant.

Many of these had been given in substance and many refused in the former report, and I had adopted some of them again, in the preparation of the following report, which was then in an advanced stage, and nearly ready to be filed.

In order to avoid mistakes, I have now therefore resorted to the device of marking, as "refused as
330 immaterial," such of those as occur to me upon examination are practically disposed of by the report itself, and need no other action except to decline to give the same, so as to enable counsel for the defendant to except if they should so desire.

FINDINGS OF FACT.

1.

That in the month of March, 1886, the defendant, The Chicago, Milwaukee and St. Paul Railway Company, made and entered into a contract in writing

with the plaintiff, dated the 6th day of March, 1886, 331
for the construction of a line of railroad from a point in the City of Ottumwa, Iowa, to a place called Harlem Station, in the State of Missouri, a distance of about 202.8 miles, to be completed on the first day of August, 1887, a copy of which contract is hereto annexed marked "A." It is contained in the fourth of the defendant's last requests to find, in printed form, between pages 13 and 53 thereof.

2.

That immediately after the execution of the said contract the plaintiff proceeded to carry out and perform the same, and did carry out and perform the same, except a portion thereof otherwise agreed between the parties, and substantially completed the same on or about the 1st day of November, 1887, and the same was duly accepted by the defendant on or about the first part of March, 1888. 332

3.

That on or about the 3d day of March, 1888, the Chief Engineer in charge of the said work under said contract made a final certificate and estimate, which is copied in full in the 20th and 21st findings of fact last asked by the defendant, and by this reference is made part hereof.

4. 333

That said certificate and estimate were delivered to the defendant, but were never delivered to the plaintiff or any of his agents, and were not seen by the plaintiff or any of his agents or brought to his knowledge otherwise than by the reference thereto in the receipt of March 9, 1888, hereinafter referred to, until the trial of this action.

5.

That the consideration for the performance of said contract originally mentioned in said contract was

334 $3,914,600, but before the execution of said contract by the plaintiff, by and with the consent of the defendant, the consideration was changed and made $3,954,600.

6.

That the plaintiff made and entered into a supplemental contract whereby he agreed with the defendant to complete his performance of said contract on or before June 1, 1887, and to allow the said defendant, by way of forfeiture, in case the said railway were not so completed by the 1st of June, 1887, the sum of $40,000.

7.

335 That the defendant failed to furnish the plaintiff with rights of way as by said contract it had agreed to do in time to enable the plaintiff to complete his contract prior to the 1st of June, 1887, or prior to the 1st of August, 1887, but on the contrary, delayed the plaintiff in the performance of said contract at a point upon the said road known as Minneville until October 27, 1887, by reason of the neglect, failure and omission of the defendant to obtain the necessary right of way at said point so as to permit the construction of the road and completion of the contract at said point.

8.

336 That the plaintiff was thereby prevented from completing his contract on or prior to August 1, 1887, and also on or prior to June 1, 1887, by the negligence, omission and fault of the defendant.

9.

That during the progress of the work the defendant purchased and furnished to the plaintiff and charged him for patented nut-locks for which the defendant paid $9,558.63.

10. 337

That the said nut-locks so furnished by the defendant were used by the plaintiff in the construction of the road.

11.

That there are no provisions in the contract which require that the plaintiff, and the plaintiff never agreed that he, should use in the construction of the railroad under said contract, any patented nut-locks.

12.

That the plaintiff was ordered by the defendant to put such nut-locks on the road at the beginning 338
of the work. That he protested against their use, and finally yielded and used them in track laying upon the promise that the matter of the charge for said nut-locks should be adjusted after the completion of the contract.

13.

That upon the 9th day of March, 1888, the plaintiff signed and caused to be delivered to a representative of the defendant a paper, writing or receipt presented to him by the defendant for signature, of which the following is a copy; and upon the signature thereof by said Clark, and its delivery by him to the defendant, the plaintiff was paid 339
by the said defendant the said sum named therein of $213,532.49, less the sum of $40,000 claimed in said paper to be retained for forfeiture in not completing performance of his work under said contract on or prior to June 1, 1887, and the sum of $3,626,865.30 included therein embraces said sum of $9,558.63 claimed by defendant to be due for nut-locks. Said $40,000 was deducted, and the actual amount so paid was $173,532.49.

"Whereas, a final estimate has been made by D. J. Whittemore, Chief Engineer of the Chicago, Mil-

340 waukee and St. Paul Railway Company, of all the work done and material furnished under the contract made between said Railway Company and Heman Clark, bearing date March 8, 1886, for the construction of the railroad from Ottumwa, in Iowa, to the Missouri River, including all extra work performed and material furnished of every kind and description, which estimate, with the prior monthly estimates, less deductions made for work not done and work assumed by said company, amounts to $3,895,798.79;

And whereas, the further sum of $34,598.90 should be credited to said Clark for materials sold by him to said company, and certain rebates and
341 other matters of that description, making, with the amount of said estimates, the sum of $3,930,397.69;

And whereas, the said Chicago, Milwaukee and St. Paul Railway Company has paid the said Clark to apply on said contract, in money, material, labor and transportation, the sum of $3,626,865 20;

And whereas, by the terms of Section 4, Article 13, of said contract, said Clark was to be charged in addition for transportation the sum of $50,000;

And by a supplemental contract was to allow the said Railway Company, by way of forfeiture in case said railway was not completed by the first day of June, 1887, the further sum of $40,000.

Making the amount paid on said contract, together
342 with the allowance of said transportation and the allowance of said forfeiture, the sum of $3,716,-865.20.

Leaving the amount still due said Clark on said contract the sum of $213,532.49.

And, whereas, in and by said contract it was provided that the said Heman Clark, party of the first part, should save the said Railway Company free and harmless from all claims that might be made against said Railway Company for liens of workmen and claims of sub-contractors, and from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle, and from all damages for

cattle or other domestic animals killed or injured, and from all damages suffered by said sub-contractors and employees while engaged upon said work, of which said class of claims, about $40,000 in amount, have been made upon and are now pending in courts by divers claimants against said Railway Company, and the sum of $40,000 of the amount so due, as aforesaid, under said contract to the said Heman Clark, has been reserved and set aside by said Railway Company, as indemnity or security for the payment of said claims and of such other claims of the same class as hereafter be made, in case said claimants, or any of them, recover judgments against said Railway Company, and the said $40,000, or the balance thereof, after paying and settling such claims as may be established against said Railway Company, is to be paid over to the said Heman Clark as soon as said claims are satisfied or said Railway Company suitably indemnified from any loss on account of the same, which $40,000 deducted from the sum of $213,532.49, so, as aforesaid, due said Clark, leaves due and owing by said Railway Company and now payable on said contract to said Heman Clark, the sum of $173,532.49. 343 344

Now, therefore, be it known, that I, the said Heman Clark, have received of and from the said Chicago, Milwaukee and St. Paul Railway Company the sum of one hundred and seventy-three thousand five hundred and thirty-two and $\frac{49}{100}$ dollars ($173,532.49), in full satisfaction of the amount due me on said estimates, and in full satisfaction of all claims and demands of every kind, name and nature, arising from, or growing out of, said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of said Railway Company to account for said forty thousand dollars, as hereinbefore provided. 345

HEMAN CLARK.

WM. C. EDWARDS.

346 14.

That said receipt and paper contained an accurate, truthful and undisputed account of all dealings between said parties except in the matter of the $40,000 deducted for time forfeiture, the $9,558.63 for nut-locks embraced in the $3,626,865.20, and the lumber hereinafter referred to, and herein valued at $2,425. Besides the above, the defendant has paid the $40,000 reserved as indemnity or security for the payment of claims against Clark, and in addition thereto upon like accounts, the sum of $521.75.

15.

347 That at the time of the signing and delivery of said last-mentioned paper the final certificate or estimate of the Chief Engineer under the contract had not been delivered to the plaintiff or any of his agents by the defendant or the said Engineer, and the contents thereof were not known to the plaintiff, other than by the reference thereto contained in said receipt of March 9, 1888.

16.

That no other final settlement of the accounts under said contract had been had between the plaintiff and the defendant at the time that the said last-mentioned paper was signed and delivered.

348 17.

That at the time of the signing and delivery of said last-mentioned paper, the question of the liability of the plaintiff for nut-locks, which had been left by the parties to this action open for settlement and adjustment until after the completion of the work under said contract, and had been referred to by the defendant to the Chief Engineer under said contract had not been passed upon by him; that the said Chief Engineer had referred the question for opinion to the defendant's counsel, who had not at said time given his opinion in relation thereto.

18. 349

That no account was ever, otherwise than by said paper and the receipt of said money, stated of the transactions under and connected with said contract between the plaintiff and the defendant.

19.

That, in or about the months of March and April, 1888, the plaintiff was the owner of 97,000 feet B. M. bridge timber then in the yard of the defendant at Chillicothe and along the line of the railroad.

20.

That the said lumber did not conform to the 350
standard of the defendant, and was not purchased by the defendant from the plaintiff, or allowed in the final certificate of the Chief Engineer, under the contract in this section to the plaintiff.

21.

That, in and about the month of June, 1888, the defendant took possession of the said lumber and converted the same to their own use without assent or knowledge of the plaintiff.

22.

That the value of the said lumber at the time of the taking, in June, 1888, was $2,425. 351

GEO. HOADLY,
Referee.

CONCLUSIONS OF LAW.

1.

That the defendant is not entitled to charge the plaintiff, or to retain and deduct, from the amount earned and payable to the plaintiff under the said contract the sum of $40,000 as a forfeiture or liqui-

352 dated damages for not completing the contract upon June 1, 1887.

2.

That under the facts proved in this case, the plaintiff is not legally liable to the defendant for any damages for failure to complete the contract within the contract time or the time agreed upon, for the reason that the plaintiff was prevented by the negligence of the defendant, and its omission to procure the necessary right of way, from completing the said work in such time.

3.

That the plaintiff is not liable to the defendant for
353 the sum of $9,558.63, the cost of patent nut locks furnished by the defendant to the plaintiff and used by him in the performance of the said contract.

4.

That there was no obligation imposed by the contract upon the plaintiff to furnish and pay for patent nut locks to be used in the construction of the said road.

5.

That the plaintiff is not legally indebted to the defendant in any sum whatever for patent nut-locks furnished by the defendant and used in the construc-
354 tion of the railroad under said contract.

6.

That the plaintiff is entitled to recover from the defendant the sum of $2,425, with interest from June 1, 1888, for the conversion by the defendant of lumber belonging to the plaintiff.

7.

That the signing and delivery by the plaintiff of the receipt on or about the 9th day of March, 1888, and the acceptance of the check of $173,532.49, un-

der the facts and circumstances proved in this case were, as to the two sums of $9,558.63, charged for nut-locks, and $40,000 charged by way of forfeiture for non-performance in time, wholly without consideration, and in violation of the contract between the parties, and do not constitute any bar to the recovery of the plaintiff for the sums of $9,558.63 and $40,000 otherwise as due under the contract. 355

8.

That the signing and delivery of said receipt, and the acceptance of the check thereunder, do not constitute a legal payment or accord and satisfaction of the said sums of $9,558.63 and $40,000, or either of them, or any part or either of them. 356

9.

That no account of the transactions under this contract, and of the claims sued on in this action, was ever had or stated between the parties to this action, otherwise than by said receipt or paper of March 9. 1888.

10.

That the plaintiff is entitled to recover the amount certified by the Chief Engineer of $3,895,793.79 without the deduction claimed by the defendants for nut-locks of $9,558.63, and without allowance to the defendant by way of forfeiture for non-completion of the railway on the 1st day of June, 1887, said sums together amounting to $49,558.63 with interest from March 9, 1888, and is also entitled to recover for timber used by the defendant on the 30th day of June, 1888, to the amount of $2,425 with interest from June 30, 1888, the whole amounting at the date of this report, viz.: the 4th day of December, 1897, to the sum of $81,305.88, for which with interest from this date and disbursements the plaintiff is entitled to judgment, less amount paid by the the defendant in excess of the reserved $40,000, 357

358 $521.75, with interest from and to the same date, being in all this day $826.53.

There will be judgment, therefore, for the plaintiff for $80,479.35 with interest and costs, interest to be computed from December 4, 1897.

GEO. HOADLY,
Referee.

At the request of the defendant, I further find as follows:

FINDINGS OF FACT.

FIRST.

359 The said contract and agreement was executed on behalf of the defendant, The Chicago, Milwaukee and St. Paul Railway, by Roswell Miller, its general manager, at Milwaukee, Wisconsin, on or about the said 6th day of March, 1886; and at the time it was so executed by him the consideration expressed in Article 15 of said contract to be paid by the defendant Railway Company to said Heman Clark in full settlement, payment and satisfaction of all and every claim and demand of the said Clark against the said Railway Company for building, constructing and fully completing the railroad therein agreed to be built, in strict conformity to the stipulations, specifications and requirements mentioned and re-
360 ferred to in the said contract, was the sum of $3,914,600; and that after the execution of the said contract on behalf of the defendant as aforesaid, and at the time of the execution thereof by the plaintiff, Heman Clark, which was done in the City of New York, the amount of the consideration stated in the said article of the contract was changed to the sum of $3,954,600, and such change noted on the contract, as appears therein.

SECOND.

At the time the said contract was so signed and executed by the plaintiff Heman Clark, in the City

of New York, and the said change and alteration 361
was made, the said Roswell Miller was not present, and afterwards, immediately upon discovering that the said change had been made, the said Roswell Miller wrote to the said Heman Clark in New York, that there was a misunderstanding as to the consideration to be paid to him; that the consideration should be $3,914,600 instead of the sum of $3,954,600, as stated in the said contract by the said alteration, if the date for the completion of the work therein expressed was to be the first of August, 1887, instead of the first of June, 1887, and thereupon the plaintiff Heman Clark agreed with the defendant Railway Company that he would forfeit the sum of $40,000 if the road was not completed by the first day of 362
June, 1887, instead of the first day of August, 1887, the date stated in the said contract for the completion of the said work, and the work was not commenced under said contract until said agreement was made.

THIRD.

Thereafter, the plaintiff, through various sub-contractors employed by him from time to time during the years 1886, 1887 and 1888, proceeded with the execution of the work provided to be done and performed by him under and in accordance with the provisions of the said contract; but the work under the said contract required and agreed to be done and performed by the plaintiff Clark, as provided by said 363
contract, was not done or completed by him, either by the first day of June, 1887, or by the first day of August, 1887.

FOURTH.

Pursuant to the provisions of Article 19 of the said contract, the southwestern terminus of the railroad agreed to be built by the plaintiff under said contract, was changed to the abutment of a bridge crossing the Missouri River at a place called Randolph Bluffs, a point approximately three and forty-five hundredths miles east of Harlem station, the

364 original point of termination mentioned in the contract; notice of which was reasonably given to the plaintiff; to which point, in the event of such change, the plaintiff in and by said contract, agreed to build said railroad instead of building the same to Harlem Station.

FIFTH.

The plaintiff continued the work of the construction of the said railroad agreed to be built by him under the said contract, by various sub-contractors employed by him, until on or about the 12th day of July, 1887, when the said work being unfinished and uncompleted, a further agreement was made
365 by and between the plaintiff and the defendant Railway Company, by which the said Railway Company agreed to complete certain of the work, of which agreement the following is a copy:

"THIS AGREEMENT, Made and entered into on the 12th day of July, A. D. 1887, by and between the Chicago, Milwaukee and St. Paul Railway Company, party of the first part, and Heman Clark, party of the second part,

WITNESSETH: That, whereas, the said parties hereto entered in a contract bearing date March 6, 1886, whereby the said party of the second part agreed to furnish all the material for, and
366 also to execute, construct and finish in every respect, in the most substantial and workmanlike manner, all the work thereinafter specified and required by the party of the first part, the Chicago, Milwaukee and St. Paul Railway Company, to be done in the construction and completion of its line of railroad extending from a point in the City of Ottumwa, Iowa, to Harlem Station, in Clay County, Missouri, a total distance of 202.8 miles; And, whereas, the said work is now in process of construction and completion by the said Heman Clark, party of the second part, and uncompleted;

"NOW, THEREFORE, it is hereby agreed by the 367
parties hereto, as follows—to wit, The said party of the first part, in consideration of the promises and agreements of the party of the second part hereinafter contained, agrees:

"FIRST.—That it will perform all the labor and do all the work necessary to surface, ditch, raise and widen the banks of said railroad from the Des Moines River Bridge at Ottumwa, to such point as C. E. Parker, the sub-contractor of the party of the second part, shall have continuously surfaced the same at the time this contract shall be executed, supposed to be near Newtown in the State of Missouri, a distance of about 77 miles from Ottumwa, including the 368
widening of Fisher Cut required by the contract of March 6, 1886.

"SECOND.—That it will perform all the labor and do all the work necessary to surface the track, do all ditching, all widening and raising of banks from the point last mentioned on said road at or near Newtown, to the southerly end of the track, as it shall be laid at the time of the execution of this agreement, supposed to be in the vicinity of Cowgill, about 71 miles from Newtown. That it will perform all the labor and do all the work necessary to surface the track, and do all ditching required from said point at or near Cowgill to the Missouri River. 369

"It is further agreed that all of said work shall be done by the party of the first part in a workmanlike manner and in full compliance with the requirements and provisions of the agreement so as aforesaid made between said parties on March 6, 1886.

"The said party of the second part, in consideration of the foregoing and agreements of the party of the first part, agrees:

"FIRST.—That he will pay to the said party of the first part for all work performed under

370 the first subdivision of this agreement—that is, from the Des Moines River Bridge in Ottumwa to a point at or near Newtown—the sum of one hundred dollars per mile of the main track of said road between said points.

"SECOND.—That he will pay for the work specified in the second and third subdivisions of this agreement—that is, from the point at or near Newtown to the Missouri River—at the rate of two hundred and fifty dollars ($250) per mile, both of main and side tracks, said side tracks to be measured from head block to head block and
371 reckoned the same as main track. Said payments to be made by deduction from the amount due or to become due to the party of the second part under and in pursuance of said contract of March 6, 1886.

"THIRD.—The party of the second part is to do, as required by said contract of March 6, 1886, the surfacing and filling of the yard at Ottumwa, and of the main track between the point where it leaves the Marion and Ottumwa line to the Des Moines River Bridge in Ottumwa, and it is understood that that work is not included in this agreement.

"FOURTH.—The said party of the second part
372 agrees that the grading of that portion of the line mentioned in the third subdivision above, from Cowgill to the Missouri River, shall be fully completed at the time the track is laid, provided that track may be laid through Dwyer Cut, near Excelsior Springs, before the cut is taken out to grade, but the party of the second part shall not thereby be relieved from completing the same.

"It is further mutually understood and agreed that this agreement is not intended to, and does not relieve the party of the second part from

any liability or responsibility for any injury 373
heretofore done to the rails in said track, or that may hereafter arise on that portion of the track described in the second subdivision above mentioned, between Newtown and Cowgill, prior to the time when the same shall be turned over to the party of the first part under this agreement; nor shall it relieve the said party of the second part from fully performing and carrying out to completion his said contract of March 6, 1886, in all respects except as to the work herein particularly specified to be performed by the party of the first part, and except also that after the execution of this contract the said party of the first part shall have possession of said track 374
and be at liberty to use the same for traffic purposes so far as it can be used without injury to the work of construction.

"In witness whereof, the parties of this agreement have caused the same to be executed the day and year first above written.

"Chicago, Milwaukee & St. Paul Ry. Co.,
"By Roswell Miller,
"Gen. Manager."

"Attest:

"Secretary.
"H. Clark, 375
"By W. W. Hegeman."

"Witness:
"W. S. Salt."

Sixth.

The plaintiff, Heman Clark, did not complete the work of tracklaying upon the said line of railroad agreed as aforesaid to be built and constructed by him until on or about the first day of November, 1887, and did not finally complete and turn over the said road to the defendant Railway Company as fully

376 constructed and completed, and the said line of railroad and work was not finally accepted by the said Railway Company as fully completed and finished as provided by the said contract of March 6, 1886, until on or about the third day of March, 1888.

SEVENTH.

In and by Section 1 of Article 15 of the said contract as altered, as hereinbefore in the second finding stated it was provided that the said Railway Company would pay to the plaintiff Heman Clark, in the manner and at the time and times therein set forth, the sum of $3,954,600 (which was subject to the modification or deduction of $40,000, hereinbe-
377 fore stated in the third finding of fact, in case the work and the road should not be completed by June 1, 1887), which sum should be in full settlement, payment and satisfaction of all and every claim and demand of said Heman Clark upon or against the said Railway Company for building, constructing and fully completing, in strict conformity to the stipulations, specifications and requirements in said contract mentioned and referred to, the said railroad in the said agreement proposed and agreed to be built, which said payments should be made in the manner therein specified, namely, that as soon as practicable after the 15th day of each and every month from and after the com-
378 mencement of the work agreed to be done, the Chief Engineer of the said Railway Company should furnish to it a certificate and estimate of the total amount and value of the various kinds of work done and material delivered in the work, or on the grounds of the Railroad Company, up to the 15th day of the month, which said estimate should be made upon the basis mentioned and set out in Section 1 of Article 18 of the said contract, and on or about the first day of the month then next ensuing the said Railway Company should pay to the said Heman Clark the total amount of said estimate, less the amount theretofore paid to him on account of

any previous estimate, and also less the sum of 379
$500,000, which the said Clark had agreed (in Article II. of said contract) to invest and keep invested in material and labor for the construction of the said railroad until the full and final completion thereof, in accordance with the terms of the said agreement.

EIGHTH.

By Section 2 of Article 15 of the said contract it was further agreed by the said Railway Company that whenever the Chief Engineer of the said Railway Company should furnish to it his certificate that all the stipulations and covenants in the said contract and agreement contained, to be by the said Heman Clark kept and performed, had been by him 380
well and truly observed and carried out, and that the said railroad therein proposed and agreed to be built had been by said Heman Clark constructed, built, completed and finished in all respects in full conformity with the covenants and agreements in that behalf made by said Clark, and should, with said certificate, present his, the said Chief Engineer's, estimate of the amount and value of the various kinds of work done by the said Clark under the terms of said contract, which said estimate it was provided and agreed should be final and conclusive between the parties to the said agreement, then the said Railway Company would pay to the said Heman Clark the sum or sums, if any, shown by the said 381
final estimate to be due to said Clark under the terms of the said agreement, and would also pay so much of the said sum of $500,000 theretofore retained by said Railway Company as had not been previously paid to said Clark; provided that the entire amount of compensation so to be paid to the said Heman Clark should not exceed the sum of $3,954,600.

NINTH.

On or about the third day of March, 1888, D. J. Whittemore, who was the Chief Engineer of the de-

382 fendant, The Chicago, Milwaukee and St. Paul Railway Company, duly made and delivered to the said Railway Company, under and pursuant to the provisions of the said contract and agreement between the plaintiff and the defendant hereinbefore mentioned, his final estimate and certificate of the amount and value of the work done and materials used by said Heman Clark in building the said line of railroad from Ottumwa, Iowa, to the Missouri River Bridge, at Randolph Bluffs, Missouri, under his said contract of March 6, 1886, including all extra work done by said Clark; which said certificate is in the words and figures following:

383 "CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.,

"CHIEF ENGINEER'S OFFICE,

"Room 51, Chamber of Commerce, Milwaukee,

MARCH 3, 1888.

"I hereby certify that the statement herewith attached is the final estimate of the amount and value of the work done and materials used by Heman Clark in building the Kansas City line from Ottumwa, Iowa, to the Missouri River Bridge abutment at Randolph Bluffs, Missouri, under his contract with this Company, dated March 6, 1886, including
384 all extra work done by said Clark, and that the said railroad agreed to be built in and by the said contract has been by said Heman Clark constructed, built, completed and finished in all respects in full conformity with the agreements of said contract, except as the said Railway Company, party of the first part, has, by agreement with said Clark, assumed the construction and completion thereof, and the compensation therefor agreed upon has been deducted in said estimate from the amount which would have been due

and owing to said Clark had he completed all of the said work. 385

"In making the monthly estimates, and in this final estimate, no deduction has been made for any part of the $50,000 mentioned in Section 4 of Article 13 of the contract, and the amount in that article specified should be charged against the estimates as made.

"I am also informed that a contract, subsequent to the original contract, was made by which $40,000 was to be deducted from the contract price in case the work was not completed by June 1, 1887, instead of August 1, 1887, as specified in the contract. The work was not completed until after August 1, 1887, but no 386 deduction of said $40,000 has been made in the estimates. Separate bills for these amounts are made and herewith returned.

"D. J. WHITTEMORE,
"Chief Engineer."

Attached to the said certificate, and made a part thereof, was a statement therein referred to, of which the following is a copy, together with certain statements and memoranda or vouchers for the different items therein specified, as therein stated:

"THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. To HEMAN CLARK, Residing at New York City, Dr. 387

"1888, Mar. 3.

"For estimate of work done and material furnished up to date, in building Kansas City Line, from Ottumwa Jct., Ia., to Missouri River, near Kansas City, Mo., as per contract, as follows:

"As per contract price..... $3,954,600 00

388 "From which certain deductions should be made, as per statement, marked "A," attached, as follows:

"For difference between cost of line to Harlem and of line built to Missouri River Bridge.....		$39,226 44
"For surfacing track, taken off Heman Clark's hands by C., M. & St. P. Ry., as per Supplt'l Contract, Dated July 12, '87, viz.:		
389 "88 06/100 miles, from Des Moines River to point near Newtown, Mo., at $100.00		8,806 00
"126 miles from point near Newtown, Mo., to Missouri River, at $250.00..		31,500 00
"For the following buildings, which the C., M. & St. P. Ry., release Heman Clark from building, viz.:		
390 "3 station houses at $2,300	$6,900 00	
"2 station houses at $2,500	5,000 00	
"1 station house.....	2,200 00	
		14,100 00
"5 coal sheds at $1,300...		6,500 00
"1 section house.....		700 00

"For the C., M. & St. P. Ry., agreeing to build 868 rods fencing covered by Heman Clark contract, at 15 cts. per rod; H. Clark having turned over to the C., M. & St. P. Ry., 895 posts and 4,340 lbs. (41 spools) wire, the same being the amount required in building the above 868 rods fence....	$130 20	391
"For the C., M. & St. P. Ry. agreeing to build culverts under the H. Clark contract; 13,000 ft. b. m. timber at $6.00 per M. ft., Heman Clark having turned over to the C., M. & St. P. Ry. the 13,000 ft. timber required for this work.....	78 00	392
"For the C., M. & St. P. Ry. agreeing to furnish and set 48 whistling posts, under the H. Clark contract, at $1.45 per post.....	69 60	
"For the C., M. & St. P. Ry. agreeing to spike track on bridges, under the H. Clark contract, as per list attached and marked A '1,' as follows: 3,194 ties at 5 3/10 c.....	169 28	393
"For work done by the C., M. & St. P. Ry. Co. to complete steam heating in Chillicothe Round		

394	House, as per H. Clark contract, which was left undone by contractor, as per statement attached and marked A 2.....	$16 64	
	" For Heman Clark's proportion of ditching at Liberty Cut, as per statement attached and marked A 3.....	382 29	
	" For amount expended by the C. M. & St. P. Ry., in putting in drain for Ottumwa Round House		
395	and T Table, as per statement attached and marked A 4.....	289 17	
	" For amount expended by the C., M. & St. P. Ry., in putting in drain for Chillicothe Round House and T. Table, as per statement attached and marked A 4.....	801 66	
	" As contractor has not laid to within $\frac{27}{100}$ miles of the required number of miles of side track, we		
396	are to deduct cost of material, &c., for same, as per statement attached and marked A 5.....	1,603 49	
			$104,372 77
	" Forward.....		$3,850,227 23
	" Add for items not covered by contract, as per statement attached and marked 'B,' viz.:		

" Extra length of Lawson Girder		$300 00	397
" Enlargement of Liberty Station building		350 00	
" 344 c. y. Rip-rap, at 1.50		516 00	
" 109 c. y. Slope Wall at 1.75		190 75	
" C. y. stone ballast	44,639		
" Less amount used in foundations of Sta's and Sec. Houses	1,242		
	43,397 c. y. at 40c.	17,358 80	398
" Difference in cost of 129 Split Switches, laid in track, and same number of common switches, as provided for in contract, at 23		2,967 00	
" 40 Out-houses, at 40.00		1,600 00	
" Material for one Section house destroyed by fire while being stored in Ninantic Station House,		273 22	
" For 75 rods fence, built around stone quarry between Randolph and Thornton, and around Haroldson's and Martin's land at same place, at 70c		52 50	399
" For difference in cost of putting in 6 in. pipe at water stations in place of 2 in. pipe, as called for in contract as per statement attached and marked 'B1'		4,709 18	

400	" For furnishing material and erecting bridge at point one mile south of Ottumwa where bank was washed out in February, 1887, as per statement attached and marked 'B 2'.....	$841 34	
	" For amount paid out by G. S. Good for borrow pits, &c., as per statement attached and marked 'B3,'.....	4 50	
401	" For extra work done on round house and turntable at Chillicothe, as per statement attached and marked 'B4,'.....	128 44	
	" For hauling stone for intake at Polo, Mo., beyond the one mile limit referred to in Art. 8, Sec. 2, of Heman Clark contract	64 00	
402	" For increased weight of iron in J. T. Clark splices furnished, over the weight represented to contractor at the time the contract was entered into, as per statement attached and marked 'B5,' as follows:		
	620,490 pounds at 1 65/100 cents $10,238 08		
	" Freight paid on same..... 632 89		
		10,870 97	
			$40,226 70
	" Forward		$3,890,453 93

" Add net amount of miscellaneous credits and charges to Heman Clark, as per detailed statement attached and marked 'C,' $5,344 86 403

$3,895,798 79

" Deduct previous estimates 3,867,734 01

" Net amount of this estimate ..... $28,064 78 "

B. G. L. J. M. E.

" Correct:
" J. C. FORD.
" Approved:
" D. J. WHITTEMORE,
" Chief Engineer.

" Approved:
" E. N. SEWALL,
Comptroller," 404

" Charge account:
Kansas City Line.

" Received of the Chicago, Milwaukee and St. Paul Railway Company, twenty-eight thousand sixty-four and 78/100 dollars in full for the above account.

Dated , 1888.

TENTH.

Upon, and after the signing and execution by the said Heman Clark of the said declaration and acknowledgment last above mentioned, and the delivery thereof by him to the said defendant Railway Company, the said Company paid to the said Heman Clark by its check, dated at New York on the said 9th day of March, 1888, the sum of one hundred and seventy-three thousand five hundred and thirty-two $\frac{49}{100}$ dollars ($173,532.49), which check was endorsed, collected and received by him, the said Heman Clark, and which sum has ever since been retained by him. 405

406 ELEVENTH.

The said Railway Company thereafter expended and paid out for and on account of the said Heman Clark the whole of the said sum of $40,000 mentioned and stated in the said declaration and acknowledgment as reserved and set aside by said Railway Company as indemnity or security for the payment of the claims therein mentioned, for the purposes specified and provided for by said receipt and acknowledgment, or as authorized by said Clark, and it has also paid and laid out on account of said Clark, in addition to the said sum of $40,000 so reserved, the sum of $521.75, in addition to all other sums to which said Clark was entitled to credit.

407 TWELFTH.

The said Railway Company did not require the plaintiff Heman Clark to furnish any materials, or to do any work not required and agreed to be furnished or performed by the said Clark in and by the terms or the provisions of the said contract or agreement of March 6, 1886; nor did it require him to furnish or erect any structure or structures of a more expensive design or plan than those called for by the standard plans of the said Railway Company, which in said agreement and contract he agreed to furnish or erect, except or otherwise than as specified and set out in the statement annexed to the
408 final certificate and estimate of the said D. J. Whittemore, Chief Engineer of the defendant Railway Company, as hereinabove stated; nor did the said plaintiff furnish any material, or do any work, not required of and agreed to be furnished or performed by said Heman Clark in and by the said contract, or furnish or erect any structure or structures of a more expensive design or plan than called for by the standard plans of the said Railway Company, and agreed to be furnished and erected by the said Heman Clark, except or otherwise than as

stated and allowed for in the said Chief Engineer's 409
final estimate and certificate aforesaid.

GEO. HOADLY,
Referee.

At the request of the defendant I state and adopt the following conclusions of law, and each of them:

FIRST.

The final estimate and certificate of D. J. Whittemore, Chief Engineer of the defendant Railway Company, dated March 3, 1888, of the amount and value of the work done and mate- 410
rials used by said Heman Clark in building the said Kansas City line of the defendant's railway from Ottumwa, Iowa, to the Missouri River Bridge at Randolph Bluffs, Missouri, under the said contract with the said Railway Company, dated March 6, 1886, including all extra work done by the said Clark in the construction of the said road, was and is final and conclusive and binding upon the plaintiff and upon the defendant Railway Company, as to the amount earned by the plaintiff for all work so done and materials furnished or used by the plaintiff in the construction of the said railroad, including all extra work done or materials furnished by the plaintiff for any of the purposes aforesaid. 411

SECOND.

The plaintiff is not entitled to recover of or from the defendant Railway Company for any extra work alleged to have been performed or materials furnished in the construction of the said line of railroad for the defendant Railway Company from Ottumwa, Iowa, to the Missouri River, under the contract of March 6, 1886, made between the said Heman Clark and the said Railway Company, or

412 for the erection of any structures more in number or of a more expensive design than called for in the plans and specifications under the said contract, as alleged in the plaintiff's complaint, except or otherwise than as stated and contained and allowed for in the final certificate and estimate of the said D. J. Whittemore, Chief Engineer of the said defendant Railway Company, hereinbefore mentioned.

THIRD.

The plaintiff is not entitled to recover of or from the defendant the sum of $2,196, or any other sum for any alleged loss, damage or expense incurred by
413 the plaintiff in removing ties, rails or other track material, in September or October, 1887, or in the performance of any of the work required to be done under the said contract between the plaintiff and the defendant Railway Company in the construction of said road, by reason of any alleged failure on the part of the defendant to procure any right of way necessary for the construction of the said railroad in the months of September and October, 1887, or at any other time.

FOURTH.

During the progress of the said work by the plain-
414 tiff Heman Clark under the said contract, the Chief Engineer of the Railway Company did, pursuant to the provisions of Section 1 of Article 15 of the said contract, make from time to time and deliver to the Railway Company monthly certificates and estimates as therein provided of the amount and value of the various kinds of work done and materials delivered in the work by the plaintiff during each month, in the manner and upon the basis as provided in Article 18 of the said contract and agreement, viz., upon the basis of the relative value of the work then done to the whole work contemplated, when completed, at the

total contract price; which estimates, prior to the final 415
estimate hereafter mentioned, amounted in all to the sum of $3,867,734.01; and upon which estimates payments were made from time to time by the Railway Company to the said Heman Clark in money, and materials furnished by the Railway Company to said Clark for use in the construction of the said railroad, and in labor and transportation, as provided by and in accordance with the terms of the said contract, which payments so made by said Railway Company to said Clark prior to first day of March, 1888, amounted in all to the sum of $3,626,-865.20.

GEO. HOADLY,
Referee. 416

The following requests, proposed by the defendant, I refuse to find:

FINDINGS OF FACT.

FIRST.

I refuse to find that the said check was delivered and the said sum of $173,532.49 was paid by the said Chicago, Milwaukee and St. Paul Railway Company to the said Heman Clark in full satisfaction of the amount due to said Heman Clark on the estimates 417
of the Chief Engineer of said Railway Company, as aforesaid, and in full satisfaction of all claims and demands of every kind, name and nature arising from or growing out of the said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of said Railway Company to account for said $40,000, mentioned as reserved to meet claims as stated in said acknowledgment, and not otherwise.

418 SECOND.

I refuse to find that the defendant Railway Company has duly paid for or on account of the said Heman Clark in money, materials, labor, transportation and other charges for which the said Heman Clark was liable, the whole amount earned by and due to him, for all work performed and materials furnished by him under the said contract made between the said Railway Company and the said Heman Clark, dated March 6, 1886, for the construction of the said railroad from Ottumwa, Iowa, to the Missouri River, including all extra work performed and material
419 furnished by him of every kind and description; and has also paid out for and on account of the said Clark the further sum of $521.75 in addition to all sums due to the said Clark from the said Railway Company for or on account of any work done or performed, or materials furnished, in the construction of the said railroad under the said contract, and for all extra work of any and every kind or description done or performed by him in the execution of said contract, or in the construction of said railroad, so agreed to be built by him.

GEO. HOADLY,
Referee.

420 And as

CONCLUSIONS OF LAW.

I refuse to find.

FIRST.

I refuse to find that in and by the receipt, declaration and acknowledgment, signed and executed by the plaintiff, Herman Clark, on the 9th day of March, 1888, mentioned and set out in the twelfth

finding of fact, hereinabove, and by the statements 421
therein contained, an account was duly stated and agreed to by and between the plaintiff, Heman Clark, and the defendant, the Chicago, Milwaukee and St. Paul Railway Company concerning the amount and value of the work done and material furnished by the plaintiff, Heman Clark, under the contract made between said Heman Clark and the said Chicago, Milwaukee and St. Paul Railway Company, dated March 6, 1886, for the construction of the railroad agreed thereby to be built from Ottumwa, in Iowa, to the Missouri River, including all extra work performed and materials furnished of every kind and description; whereby it was stated and agreed, that the amount and value of said work 422
so performed and materials furnished, including all extra work so performed and materials furnished of every kind and description in the construction of said railroad, was the sum of $3,895,798.79; and that the plaintiff was also entitled to be credited with the further sum of $34,598.90 for materials sold by him to said Railway Company, and certain rebates and other matters of that description, making, with the amount of said estimates of the amount earned by him under the said contract as aforesaid, the sum of $3,930,397.69; and that the said Chicago, Milwaukee and St. Paul Railway Company had paid to the said plaintiff, Heman Clark, to apply on the said contract, in money, material, labor and trans- 423
portation, the sum of $3,626,865.20; and that, by the terms of Section 4, Article 13 of said contract, the plaintiff, Clark, was to be charged in addition for transportation, the sum of $50,000; and by a supplemental contract was also to allow to the said Chicago, Milwaukee and St. Paul Railway Company, by way of forfeiture in case said railroad was not completed by the first day of June, 1887, the further sum of $40,000; making the amount paid on said contract, together with the allowance of

424 said transportation and the allowance of said forfeiture, the sum of $3,716,865.20; and it was also thereby stated and agreed that the amount then due to the said Clark on said contract was the sum of $213,532.49.

And it was in and by said acknowledgment and declaration further stated and agreed that $40,000 of the amount so due under said contract by said Railway Company to said Clark should be reserved and set aside by said Railway Company as an indemnity or security to it for the payment of claims against said Heman Clark or against the said Railway Company for liens of workmen and claims of sub-contractors of said Clark, and
425 from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle, and from all damages for cattle and other domestic animals killed or injured, and from all damages suffered by said sub-contractors and employees while engaged upon said work, from and against which the said Heman Clark had agreed to save the said Railway Company free and harmless, and that there was then payable on said contract to said plaintiff Clark, by said Railway Company, the sum of $173,532.49.

SECOND.

426 I refuse to find that in and by the payment of the said sum of $173,532.49, made by the said defendant Railway Company to the said Heman Clark on the said 9th day of March, 1888, upon the execution and delivery by him to the said Railway Company of the receipt, declaration and acknowledgment hereinbefore mentioned, and in and by the declaration and acknowledgment of the said Heman Clark then given as set out in the twelfth and thirteenth findings of fact hereinbefore stated, whereby the said Heman Clark acknowledged that he had

received from the said defendant, the Chicago, 427
Milwaukee and St. Paul Railway Company, the said sum of $173,532.49, in full satisfaction of the amount due to him on the said estimates of the Chief Engineer of the said Railway Company therein referred to, and in full satisfaction of all claims and demands of every kind, name and nature, arising from or growing out of the said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of the said Railway Company to account for said sum of $40,000 reserved as aforesaid, there was an accord and satisfaction between the said plaintiff, Heman Clark, and the defendant, the said Chicago, Milwaukee and St. Paul Railway Company, as to the amount due 428
by said Railway Company upon the estimates of the Chief Engineer of said Railway Company and of the amount and value of all work done and material furnished by said Clark under the said contract between said Clark and said Railway Company for the construction of said railroad from Ottumwa to the Missouri River, including all extra work performed and material furnished, of every kind and description; and a payment by said Railway Company to said Heman Clark of said sum of $173,532.49, in full satisfaction of the amount due to said Clark from said Railway Company upon said contract, and for all claims and demands of every kind, name and nature, in favor of said Heman Clark against said Chicago, 429
Milwaukee and St. Paul Railway Company, arising from or growing out of said contract of March 6, 1886, and of the construction of the said railroad before referred to, and of the amount due to said Clark on said estimates of said Chief Engineer of said Railway Company, except the obligation of said Railway Company to account for the sum of $40,000 reserved by said Railway Company as an indemnity against

430 claims which might be made against said company for liens of workmen and claims of sub-contractors and other claims for damages, as specified in said acknowledgment.

THIRD.

I refuse to find that the plaintiff is not entitled to recover of or from the defendant the sum of $2,425, or any other sum, for or on account of any timber belonging to the plaintiff, alleged to have been converted by the defendant Railway Company to its own use in the month of June, 1888, or at any other time.

431

FOURTH.

I refuse to find that the defendant Railway Company is entitled to recover of the plaintiff, Heman Clark, the sum of five hundred and twenty-one $\frac{75}{100}$ dollars, together with the costs of this action.

GEO. HOADLY,
Referee.

432

UNITED STATES CIRCUIT COURT, 433

SOUTHERN DISTRICT OF NEW YORK.

HEMAN CLARK

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

The defendant hereby requests the Referee to make the following findings of fact and conclusions of law in the above entitled action, namely: 434

AS MATTERS OF FACT.

FIRST.

That in the month of January, 1886, the defendant Railway Company invited proposals to be made by the plaintiff for the construction for the defendant of a line of railroad, extending from a point in the City of Ottumwa, Iowa, at the junction of a road already existing and belonging to the plaintiff, to a place called Harlem Station, in Missouri, a distance of 202.8 miles, such offer to be for the construction of the road for a lump sum, the same to be finished by the first of June, 1887, or for a less sum if to be finished by the first of August, 1887. 435

Refused. GEO. HOADLY, Referee.

SECOND.

The plaintiff, Heman Clark, thereupon submitted a bid or offer to construct the said road for the sum of $3,990,000, if he finished it by June 1, 1887, and

436 for the sum of $3,950,000, if given until August 1, 1887, to complete the same, or $40,000 less.

Refused. GEO. HOADLY, Referee.

THIRD.

The defendant Railway Company thereupon offered to the plaintiff, through its General Manager, Mr. Roswell Miller, to pay to the plaintiff the sum of $19,500 a mile for the work, the road to be completed by the first of June, 1887, and if the plaintiff took until August 1, 1887, to complete the same, there should be deducted from that price the sum of $40,000.

437 Refused, GEO. HOADLY, Referee.

FOURTH.

In the month of March, 1886, the defendant Railway Company and the plaintiff, Heman Clark, entered into a contract or agreement dated the 6th day of March, 1886, for the construction of the said line of railroad from a point in the City of Ottumwa, Iowa, in a southwesterly direction through the counties of Wapello, Monroe, Appanoose and Wayne, in the State of Iowa, and the Counties of Putnam, Sullivan, Grundy, Livingston, Caldwell, Ray and Clay, in the State of Missouri, to Harlem
438 Station in the said State—a total distance of 202.8 miles, of which contract a copy is hereto annexed, marked "A."

Given, GEO. HOADLY, Referee.

439

"A."

CONTRACT

FOR

CONSTRUCTION OF KANSAS CITY LINE. 440

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY

WITH

HEMAN CLARK.

MARCH 6TH, 1886. 441

[NOTE.—The marginal notes within are not on the original.]

THIS AGREEMENT, made and entered into this sixth day of March, A. D. 1886, by and between the Chicago, Milwaukee & St. Paul Railway Company, a

Parties.

corporation of the State of Wisconsin, party of the first part, and Heman Clark, of the city, county and State of New York, party of the second part: Witnesseth that,

WHEREAS, The party of the first part has surveyed and located a line of railroad extending from a point in the city of Ottumwa, Iowa, in a south-

Recitals.

westerly direction through the counties of Wapello, Monroe, Appanoose, and Wayne, in said State of Iowa, and the counties of Putnam, Sullivan, Grundy, Livingston, Caldwell, Ray and Clay, in the State of

Location of Road.

Missouri, to Harlem station, in the county and State last aforesaid, a total distance of two hundred two

Length.

and eight-tenths ($202\frac{8}{10}$) miles; and desires to have the same constructed, built and fully completed, ready for the rolling stock thereon, in accordance in all respects with certain profiles, plans and specifications now made or hereafter to be made by the Chief Engineer of said first party, and under the supervision and direction and to the satisfaction of said Chief Engineer; and,

WHEREAS, The party of the second part proposes to furnish all the material for the construction of said railroad and also to construct, build and complete the same in the manner and within the time required by said first party, upon the terms and conditions hereinafter mentioned and set forth.

NOW, THEREFORE, it is hereby mutually understood and agreed by and between the parties hereto as follows, to wit:

Agreements by contractor.

ARTICLE I.

SEC. 1. For and in consideration of the payments, covenants and agreements of the party of the first part, hereinafter contained, to be by said first party duly made, kept and performed, the party of the

second part hereby covenants and agrees to furnish all the material for and also to execute, construct and finish in every respect, in the most substantial and workmanlike manner, all the work hereinafter specified and required by said first party to be done in the construction and completion of said first party's line of railroad extending, as aforesaid, from a point in the city of Ottumwa, Iowa, to Harlem station in Clay county, Missouri, a total distance of two hundred two and eight-tenths ($202\frac{8}{10}$) miles.

Clark to furnish material and build road.

SEC. 2. The party of the second part further agrees to commence the work aforesaid as soon as practicable after the execution of this agreement, and to proscute the same with such forces and means as will, in the opinion of the Chief Engineer of said first party, insure the completion thereof by the first day of August, 1887, and also to be subject at all times during the progress of said work to the directions of said Chief Engineer as to the mode of doing the same.

To be completed by Aug. 1, 1887.

SEC. 3. The party of the second part further agrees that all the materials and workmanship required by first said party to be furnished or performed for, in, or about the work hereinabove mentioned and hereinafter particularly specified and set forth, shall be furnished and performed in strict accordance with the rules, regulations and specifications therefor now made or hereafter to be made by the said Chief Engineer, and in all respects to his satisfaction and acceptance; and that he, the said second party, will progress with said work at such times, in such manner and at such particular points on the line thereof as said Chief Engineer may direct; and will not employ thereon any person, either as overseer or laborer, who has been dismissed from any other work for bad workmanship, intemperance or disorderly conduct; and will dismiss from said work any and every person who is, in the opinion of said Chief Engineer, disorderly, intemperate, quarrelsome, unfaithful or unskillful.

To be done to satisfaction of Engineer.

ARTICLE II.

Grades.

SEC. 1. The party of the second part further agrees to grade and build the roadway of the railway hereinabove mentioned, in conformity with the grades drawn on a certain profile of said line, one copy of which said profile is filed in the office of the Chief Engineer of said first party, and another copy thereof is in the possession of said second party; but said Chief Engineer shall have the right to change the grade or grades now drawn thereon wherever such change shall, in his opinion, be necessary in order to keep said roadbed at least one foot above high water, and in any and every such case the party of the second part agrees to build said roadbed upon the new grades so as aforesaid changed and established.

C. E. of R. R. may change grades.

Contractor to clear right of way.

SEC. 2. The party of the second part further agrees to clear the ground set apart for the aforesaid railroad to the boundary line of said first party's land, as the same shall be designated by said Chief Engineer; and to cut off or grub up from the space required for the roadbed and its necessary slopes and side drains, and from the surface of borrowing pits, all trees, brush, stumps and other vegetable matter, and the same, together with logs, brush, wood and fences of every description, to burn or otherwise remove from the ground, as said Chief Engineer may direct, so as not to injure the adjoining lands or obstruct the lines for the fences of said railroad. *Provided, however*, that wherever the embankments to be made shall exceed two feet in height, the said second party shall only be required to cut the trees, stumps and brush close to the ground; *but provided also*, that wherever the embankments so to be erected shall be less than two feet in height, the said second party shall grub up and remove beyond the limits of said embankments, all the trees, stumps, brush, and other vegetable matter found within the slope stakes thereof.

SEC. 3. The party of the second part further agrees

to make all the excavations required for the formation of a roadbed for a single track and turnouts, and for the preparation of depot grounds and sites for water stations; to dig all ditches, cut new channels for streams, prepare foundations, alter all highways or private roads; and to make such other excavations in any way connected with or incidental to the construction of the aforesaid railroad, as the said Chief Engineer may require and direct; and also to deposit all material from the excavations aforesaid, or any of them, upon the road in embankments, where embankments are needed, within an extreme haul of one thousand feet, as said Chief Engineer may direct. *Provided, however*, that said second party shall be compensated as hereinafter, in the 16th Article of this agreement, provided, for hauling out and depositing in places for that purpose reserved and specified by said Chief Engineer, any stone suitable for masonry, rip-rap or ballast, which may be found in the cuts on said line of railway, in case said Chief Engineer shall direct and require such stone to be so hauled out and deposited.

To make all necessary excavations R. R. depot grounds.

As C. E. may require and direct.

Hauling out stone, &c.

SEC. 4. The party of the second part further agrees to make all the embankments required for any of the purposes in the preceding section of this Article specified, not formed from excavations taken from the prism of the road, or from other necessary excavations; and to so construct and build the roadbed of the railroad aforesaid that the width thereof at the grade line shall be twenty-two (22) feet in excavations and fifteen (15) feet on embankments. The said second party also agrees to make the slope in rock cuttings generally one horizontal to five perpendicular, and in earth cuttings and embankments one and one-half horizontal to one perpendicular; or to form such slopes in such other manner as said Chief Engineer may prescribe wherever it shall seem to him, the said Chief Engineer, necessary so to do.

To make all embankments.

Width of road.

Slopes in cuttings and embankments.

SEC. 5. The party of the second part further agrees that all the materials composing the embank-

ment aforesaid shall be entirely imperishable, and that wherever the natural surface upon which said embankments are to be placed is of such a nature as, in the opinion of said Chief Engineer, to impair the stability or usefulness of said embankments, then, and in every such case, said second party shall and will remove such natural surface to such width and depth and dispose of same as said Chief Engineer may direct; and whenever the site of said embankment is covered with snow of such depth as, in the opinion of said Chief Engineer, to impair the utility of the work proposed to be done thereon, then, and in every such case, said second party shall and will remove and deposit the same beyond the slope stakes and so clear said site at least one hundred feet in advance of the embankment; said second party also agrees to dig side ditches through all excavations and to make the same four and one-half (4½) feet wide on top and one (1) foot deep, and one and one-half (1½) feet wide at the bottom, in earth excavations, and two and one-half (2½) feet wide and one (1) foot deep on rock excavations.

Character of embankments.

Ditches.

SEC. 6. The party of the second part further agrees to deposit in waste banks or otherwise, as said Chief Engineer may direct, all material taken from excavations over and above the quantity of such material required to form the embankments aforesaid, and in case the quantity of material taken from cuttings shall not be sufficient to form the requisite embankments, then the said second party agrees to supply such deficiency by taking material from such place or places as said Chief Engineer shall designate within an extreme haul of one thousand (1,000) feet. Said second party also agrees that in all cases where embankments are placed over culverts, he will so deposit the material as to cause no improper strain on said culverts, and that in filling behind abutments he will deposit the earth in such a manner as the said Chief Engineer may direct.

Excavations and embankments.

ARTICLE III.

SEC. 1. The party of the second part further agrees to furnish all the material for and also to construct and put in place a wrought iron single track railroad bridge over the Des Moines River at Ottumwa, Iowa. The total length of said bridge is to be five hundred and eighty (580) feet over all, consisting of four equal spans, having masonry piers resting on the rock bed of said river; and said masonry shall be of the general style, quality and plan of the masonry in said first party's iron bridge at Cedar Rapids, Iowa, to which last named bridge reference is hereby made. Iron bridge over Des Moines River, Ottumwa.

The said second party also agrees that the iron work and floor system of the bridge so as aforesaid to be constructed shall fully conform to the plans to be hereafter prepared by the Chief Engineer of the party of the first part, and that the workmanship and quality of material on and in said bridge shall be in strict accordance with the standard specifications of said first party, a copy of which specifications is hereto attached and hereby made part hereof. Do.

SEC. 2 The party of the second part further agrees to furnish all the material for and to construct and put in place two (2) wrought iron single track railway plate girder bridges. Each of said bridges shall be of twenty-six (26) feet total length and each shall have masonry abutments. One of said bridges shall be located and placed in the line of the Wabash Railway in Appanoose County, Iowa, to afford an undercrossing of said line to said first party's railroad; and the other of said bridges shall be placed over the line of the so called St. Jo branch of said Wabash Railway at Lawson, Ray County, Missouri, to afford an overcrossing of said line to said first party's railroad. Both of said bridges and the abutments therefor shall in material and workmanship strictly conform to the standard plans and specifications of said first party. 2 Girder bridges.

SEC. 3. The party of the second part further agrees that all the masonry by him to be done in or

Bridge masonry.

about the bridges mentioned in this agreement shall be hammerdressed and laid either in the best hydraulic cement mortar, or dry, as said Chief Engineer may direct. The beds and joints of the face stone shall be dressed back twelve inches from the face, and shall be brought to a joint of not more than three eighths of an inch when laid; the faces may be rough, except that the edges are to be brought to a line. The stretchers in a course, both front and rear, shall have a breadth of bed equal to at least the height of the stone, but in no case less than eighteen inches, and the headers shall have a length at least two and one-half times the height of the stone, and in no case less than three feet. One fourth of the wall in front and rear shall be occupied with headers so arranged that the headers of the course shall fall between the headers of the courses above and below; the principal stone of the backing and interior of the walls shall be large and well-shaped, not less than six inches thick and two feet area of bed. When the wall is five feet or less in thickness, one-third of the number of headers shall extend through the wall, and when of greater thickness than five feet, the headers shall be at least four feet long (unless the thickness of the wall is such that the stretchers in the same course on the opposite side of the wall will not admit of headers of that length). The face stone shall be laid in courses of not less than ten inches thick. The coping stone of abutments, piers and bridge seats of bridges are to be not less than eight inches thick, and to be neatly dressed with bush hammer on their exterior surfaces, and brought to one-fourth of an inch joints.

Stone work, masonry, &c.

All stones shall be prepared by dressing and hammering before they are brought on to the walls, and shall be laid firmly on their broadest beds without the use of chips, pinners or levelers; when laminated, their bearing ends shall be parallel to their laminæ; no shelving projections shall be allowed to extend beyond the under bed on either side. The rear or backing face of all masonry shall be laid and

bonded in a regular manner, and lined to a fair face. The stone and work shall be kept free from all dirt that will interfere with the adhesion of cement or mortar to the stone. The back filling shall not be commenced on the masonry until the same is directed by the said Chief Engineer.

Cement, to be used either in mortar or grout, shall be composed of the best quality of hydraulic lime, that has not been manufactured more than two months previous to using, and clean, sharp sand, in proportion of one part cement and two parts sand, and if sand is not obtained from natural beds or banks of sufficient purity, it shall be screened and washed until all loam, gravel or other improper matter is removed. The hydraulic lime shall be transported from the place where it is manufactured to the place where it is to be used in tight casks, in order to prevent its injury from water or air; and no hydraulic or other lime shall be used that has been wet or in any way damaged, nor until it has been approved of by the said Chief Engineer. The cement shall not be mixed more than one-half hour before the mortar is to be used, and mortar left over night shall be removed entirely away, and not put into the work. Grout shall be used immediately after it is made. Cement, &c.

In making mortar or grout, the materials shall be mixed and worked so as to thoroughly incorporate them and to render the mass uniform throughout every part, and no more water shall be used than is necessary to give the proper consistency. When mortar is exposed so as to dry too rapidly in the work, it shall be covered up, or have water occasionally sprinkled on it, as the said Chief Engineer may direct. In laying stone in mortar their beds are to be so prepared that when settled down they may rest close and full on the mortar; the joints are not to be injured after the stone has settled on its bed by lifting up one side to bring the stone level, or in line, etc., and care shall be taken in handling stone not to remove those already laid. The stone shall Mortar and grout. Stone work.

be laid full in their mortar beds and joints so as to render the work impervious to water, and so that the whole wall shall be one solid mass of stone and mortar, and all masonry laid in mortar shall be thoroughly pointed.

All stone used on the work shall be perfectly sound and durable, and of such size and dimensions as said Chief Engineer may approve, and none but competent stone masons shall be employed in laying walls of any kind.

SEC. 4. The party of the second part further agrees to furnish all the material for, and to construct and erect all such other truss bridges and all such pile and trestle bridging as the said party of the first part may require in and upon the aforesaid line of railway. All such truss bridges shall be of the Howe Truss pattern, and they, together with all pile and trestle bridges, shall be in accordance with said first party's standards for such structures respectively, and in number, length and location shall be such as the said Chief Engineer may designate; and all the material and workmanship in any wise pertaining to said structures, or any of them, shall be furnished and performed to the satisfaction and acceptance of said Chief Engineer.

Truss Bridges and Trestle Bridges.

SEC. 5. The party of the second part further agrees to furnish the material for, and also to construct and put in place bridges, for all such over and under highway crossings on said line of railroad as said Chief Engineer may designate and require, and in accordance with plans therefor to be furnished by him.

Highway Bridges.

SEC. 6. The party of the second part further agrees to furnish all the material for, and to build all the culverts necessary to afford ample water-way across the aforesaid line of railway and highway wings. The size, length and location of said culverts shall be determined by the said Chief Engineer, and the same shall be constructed in all respects as to material and workmanship in accordance with the standard plans of said first party.

Culverts.

Provided, however, that said second party, if he so elect, may, with the approval, and upon the plans and specifications and under the direction of said Chief Engineer, substitute and build culverts of stone instead of wood; but no extra compensation shall be claimed or allowed therefor by or to said second party.

SEC. 7. The party of the second part further agrees that all timber and plank (except in foundations) in culverts, cattle-guards, trestle-work, bridge abutments, cattle-passes and road, pile and farm bridges, shall be of good quality and of such kinds as the said Chief Engineer may direct, free from shakes, wanes, black and unsound knots, and all descriptions of decay; that wherever piling or timber foundations are required, the same shall be made under the direction of the said Chief Engineer; that the piles, after being driven, shall be cut off in an even manner horizontally, and the interstices filled with stone or gravel, and when required, shall be capped with timber hewed or sawed from 6 to 12 inches square, which timber shall be fastened to the piles by white oak tree-nails, and then planked with pine plank, pinned or spiked to the timbers; that other timber foundations shall be composed of a frame work of timber, hewed or sawed from 6 to 12 inches square, as the said Chief Engineer may direct, the same to be thoroughly and horizontally bedded and filled in with gravel well puddled, and then, at the direction of said Chief Engineer, covered with a flooring of pine plank, and that all timber structures shall be built in conformity with plans to be furnished from time to time by the said Chief Engineer.

Timber.

Piles.

Timber structures.

Said second party also agrees that piles, whether used in foundations, trestle-work or pile bridges, shall be of good sound quality white oak, not less than ten inches in diameter at the smallest and fourteen inches at the largest end, and of such lengths, and driven to such depths, as said Chief Engineer may require.

Piles.

Provided, however, than whenever piles of more than thirty (30) feet in length are required, the said second party may substitute and use cedar piles, of not less diameter, in place of oak.

ARTICLE IV.

Highway crossings, cattle guards and crossing signs, whistling posts, &c.

SEC. 1. The party of the second part further agrees to furnish the material for, and also to construct and put in place at all highway crossings of the railroad hereinabove proposed to be built, cattle-guards, crossing-signs and crossing-plank, together with whistling posts, set at proper distance from said crossings; and that all the material and workmanship therein and thereof shall be in accordance with the standard plans and specifications of said first party; and said second party also agrees to furnish and put in place such farm and private crossings of said railroad, together with the crossing-plank for same, as said Chief Engineer may require and direct.

Fencing of road.

SEC. 2. The party of the second part further agrees to furnish all the material for, and to construct in good and workmanlike manner, and to the acceptance of said Chief Engineer, on both sides of the right of way of said railroad, wherever practicable, throughout the whole length thereof, a barbed wire fence with the necessary extensions to cattle-guards at highway crossings, and with gates at requisite farm crossings. The said fence shall consist of five (5) strands of twisted No. 12 galvanized barbed wire, securely fastened on posts sixteen (16) feet apart from centres; and said posts shall be of cedar, seven and one-half ($7\frac{1}{2}$) feet long, five (5) inches in diameter at the smallest end, and properly set three (3) feet into the ground.

ARTICLE V.

SEC. 1. The party of the second part further agrees to fully grade and prepare the grounds for thirty (30) stations, and for two (2) division terminal

stations, at such points on the line of said railway as shall be hereafter designated by the Chief Engineer aforesaid. The grading and preparations of said grounds shall include the making of necessary culverts, drains and bridges, and also the grading required for a round-house, coal-shed and turn-table at each of said division terminal stations. Each of said thirty (30) station grounds shall be so graded as to admit of laying thereon an average of thirty-four hundred (3,400) feet of side track, and the spaces between the main, side and business tracks there laid shall be graded to conform to the plane of said tracks, and all the work shall be in conformity to that of standard depot grounds of the so-called Marion Extension of said first party's railroad. Each of the division terminal station grounds shall be of such form and size as will best accommodate three (3) miles of side tracks, and all of the stations in this Article referred to shall be laid out, arranged, graded and built as said Chief Engineer may require and direct.

Grounds for 30 stations, 2 Divisions.

Grading of grounds, culverts, drains, bridges, &c.

ARTICLE VI.

SEC. 1. The party of the second part further agrees to furnish and lay in place all the track material required by said first party for two hundred two and eight-tenths ($202\frac{8}{10}$) miles of main track, and for the hereinafter mentioned side tracks, of its railroad aforesaid, including in said track material so by him to be furnished and laid in place, steel rails of sixty pounds per yard; splices and bolts of the J. T. Clark pattern, and spikes and ties; and all said material shall be of the said first party's standards and sizes.

Track material to be furnished by contractor.

Materials.

The said second party also agrees to purchase from the said first party all the steel rails, angle bars and bolts for same, and all the track spike required for main and side tracks aforesaid, and to pay for the same at the following rates, to wit:

To purchase rails and materials of R. R. C.

Steel rails, thirty-seven dollars per gross ton, f. o. b., in Chicago.

Angle bars, one and sixty-five one-hundredths ($1\frac{65}{100}$) cents per pound, f. o. b., in Milwaukee.

Track bolts, two and sixty-one hundredths ($2\frac{60}{100}$) cents per pound, f. o. b., in Milwaukee or Chicago.

Track spike, two and twenty-five one-hundredths ($2\frac{25}{100}$) cents per pound, f. o. b., in Chicago.

Provided, however, that said second party shall not purchase or use second quality steel rails to an amount exceeding three (3) per cent. of the total quantity of rails required for main and side tracks as aforesaid, and shall lay such rails in side tracks only; and *provided, further*, that the usual and customary deduction shall be made by said first party from the above named price of thirty-seven dollars per ton, for all such second quality steel rails so as aforesaid by it sold to said second party.

SEC. 2. The party of the second part further agrees to furnish and lay in place three thousand (3,000) white or burr oak cross-ties for each and every mile of the main and side tracks aforesaid, except for the first sixty (60) miles extending south from said city of Ottumwa, in which said sixty miles of main track, and in the sidetracks thereto appertaining, one-half of the ties to be laid in each mile may, if said second party so elect, be of white cedar; *provided, however*, that all curves in said sixty miles shall be laid with oak ties as aforesaid.

Ties.

The said second party also agrees that the white or burr oak ties so as aforesaid to be by him furnished and laid, shall be manufactured from sound, green timber, eight (8) feet long, when squared at the ends; hewn straight on two parallel sides, and taken out of wind six (6) inches in thickness, and eight (8) inches wide on hewn surface; and in case said second party shall elect to use white cedar ties, as hereinbefore in this section provided, the same shall be manufactured from round, sound, green timber, and shall be of the same dimensions in all respects as are hereinabove required for oak ties. And said second party also agrees that all the bridge ties required by said first party to be laid on truss,

Ties.

Bridge ties.

trestle or pile bridges of the entire line of the railroad aforesaid, shall be in quality, number and dimensions in strict accordance with said first party's plans and standards for such structures, respectively.

SEC. 3. The party of the second part further agrees to furnish as aforesaid all the material for, and to lay in the thirty (30) station grounds hereinabove, in Article 5, referred to, an aggregate of nineteen (19) miles and sixteen hundred and eighty (1680) feet of side tracks, in such manner and to such an amount at each of said stations as the said Chief Engineer may direct; *provided*, that the aggregate amount of side track so required to be laid by said second party shall not exceed the total hereinabove in this section stated. The said second party also understands and agrees that the tracks required at each of said stations shall, generally, be a business track, running to the rear of the station house, and connected at both ends with the main track; a passing track alongside the main track, and connected therewith at both ends; and, wherever required, a cross-over track from main to passing track.

Side tracks station grounds

And the said second party also agrees to furnish, as aforesaid, all the material for, and to lay at each of the division terminal stations hereinabove, in Article 5, referred to, three (3) miles of side tracks, exclusive of the tracks within the round-houses hereinafter mentioned, in such manner and on such plan of arrangement as the said Chief Engineer may hereafter designate. The measurement of all the side tracks mentioned and referred to in this section shall be taken from head block to head block, and where any tracks are laid near and parallel to each other, the distance between centres shall be fourteen (14) feet.

Tracks at Terminal Stations

SEC. 4. The party of the second part further agrees to full spike all the main and side tracks hereinabove mentioned, so by him to be laid as aforesaid, and to surface the same from the sides thereof; to place and well bolt the splices therefor, and to do all

Spiking tracks

the work of laying said tracks in the most approved manner, and to the satisfaction and acceptance of said first party's Chief Engineer.

Frogs, switches, &c.

SEC. 5. The party of the second part further agrees to furnish and put in place all the frogs, switch stands, connections, chairs, switch ties and head blocks required for the above mentioned main and side tracks of said first party's railroad; and all crossing timbers and frogs required for the crossing by said railroad of the lines of other railroads, together with all stop signs required for such crossings. The frogs for tracks leading from the main track shall have an angle of one in ten, and all other frogs shall have such angles as shall hereafter be designated by said Chief Engineer, and the material and workmanship of all the articles in this section enumerated shall be in accordance with the standard plans of said first party, and to the acceptance of its said Chief Engineer, and the same shall be put in place in strict conformity to his directions.

ARTICLE VII.

Buildings.

SEC. 1. The party of the second part further agrees to furnish all the material for and to construct and erect in a good and workmanlike manner, in full conformity to the standard plans of said first party, and to the satisfaction and acceptance of its said Chief Engineer, the following named and described buildings on the line of said railroad, to wit:

Station houses.

a. Thirty (30) station houses to be located and placed at such points on the station grounds hereinabove in Article 5, referred to, as the said Chief Engineer may designate. The said station houses shall each have a freight room of forty (40) feet in length, and a front platform of a total length of one hundred and seventy-five (175) feet, but in all other respects said houses shall fully conform to the standard plan of the station houses now built and used on the, so-called, Marion Extension of said first party's railroad. *Provided, however,*

that in case the said first party shall require at Chillicothe, Missouri (the same being one of the stations above referred to), a larger building than that of the plan above mentioned, or more than one building for station purposes, then and in such case, the said second party shall furnish the material for and construct and erect such building or buildings, and the said first party shall pay the actual cost to said second party, of the same, plus ten (10) per cent. for use of tools and superintendence, *less* the sum of twenty-three hundred (2,300) dollars, which said second party agrees to be the cost of one of said thirty station houses. Extra at Chillicothe.

b. Seventeen (17) section houses; thirty (30) section tool houses, and five (5) coal sheds. Each of said coal sheds shall, including the crane space, be one hundred and seventy-five (175) feet in length, and each shall have the necessary cranes and machinery and six (6) coal buckets; and all of said buildings shall be constructed and erected in conformity with the plans to be hereafter made by said Chief Engineer, and to his acceptance, and shall be located and placed at such points on the line of railroad aforesaid as he may designate. *Provided, however*, that if the said first party shall desire to erect at any point on said railroad any other, or different kind of coal shed or platform in place of one of the five coal sheds above mentioned, then the said second party shall build the same as the said Chief Engineer may direct, and the said first party shall pay to the said second party the actual cost thereof, plus ten (10) per cent. for use of tools and superintendence, *less* the sum of thirteen hundred (1,300) dollars, which last named sum is by said second party agreed to be the cost of one of the five coal sheds first above named; and, Section h... tool hous... coal sheds. Extra coal sheds.

c. Two (2) brick round houses, having an aggregate of twenty-four (24) stalls. Each round house shall have the number of stalls to be hereafter designated by the said Chief Engineer, but not to exceed in both the aggregate number aforesaid, and shall also Round hou...

have a smoke-jack for each stall, and steam pipes in place for steam heating, and steel rails laid in place leading to turn-table; and the entire material and workmanship on, in and about said round houses and their appurtenances shall be in accordance with the standards of said first party, and to the satisfaction and acceptance of its said Chief Engineer.

Turn tables.

SEC. 2. The party of the second part further agrees to furnish in place two wrought-iron turn-tables of the Edge Moor, or such other pattern as may be approved by the said Chief Engineer, and the same shall be located and placed as designated by him. Each of said turn-tables shall be fifty-six (56) feet in diameter, and the centre bearing of each shall have suitable masonry support. The circumscribing walls of the turn-table pits shall be constructed of stone or brick masonry, in full conformity with the standard plans of said first party, and the circular rails shall be supported by ties laid on gravel or broken stone ballast.

ARTICLE VIII.

Water tanks.

SEC. 1. The party of the second part further agrees to furnish in place ten (10) 16 x 24 water tanks. Each of said tanks shall rest on caps supported by at least eighteen (18) oak piles, well driven, and each shall be furnished with a number three (No. 3) regular Knowles pump and Shepley boiler to suit said pump, and said boiler and pump shall be set on proper foundations and enclosed in suitable buildings. Each of said water tanks shall also be furnished with the necessary pipe and pipe connections to well and to tank, and with a discharge pipe and necessary apparatus for conveying water from tank to locomotive. The location of said tanks shall be designated by said Chief Engineer, and all the material and workmanship in, on or about them or their appurtenances shall be in all respects in accordance with the standard plans of said first party, and to the satisfaction and acceptance of its said Chief Engineer.

Pumps.

SEC. 2. The party of the second part further agrees that he will provide at each of the said water stations, hereinabove referred to, a suitable well or other sufficient means to afford to said first party an ample supply of water at such stations; that all wells so as aforesaid by him provided shall be made of such size and depth as will, in the opinion of said Chief Engineer, at all times fully supply all the water needed at said stations; that said wells shall be by him properly stoned up, where stone suitable for that purpose can be found within a haul of one mile therefrom, and that in case suitable stone cannot be found within the haul aforesaid, the said wells shall in like manner be properly timbered and planked up. *Provided, however*, that in case the said first party shall require wells to be stoned up where no suitable stone therefor can be found within the haul aforesaid, then and in every such case, the said second party shall and will procure said stone, as and where directed by the said Chief Engineer, and do said work so required, and said first party shall and will pay to said second party, in addition to the sum hereinafter stipulated to be by said first party paid for all the work covered by this agreement, the cost of transporting said stone to the well or wells so as aforesaid required to be stoned up. Wells at stations.

ARTICLE IX.

SEC. 1. The party of the second part further agrees that he will, if said first party so require, ship over the lines of the said first party's railway to the said city of Ottumwa, all the material to be used in the construction of the railroad referred to in this agreement, and all merchandise and contractor's supplies, so called, required and used by him in the prosecution of said work, so far as the said material, merchandise and supplies shall be purchased or procured at any point or points on said first party's lines of railroad, or at any points on lines of railroad connecting therewith; and will pay to said first Shipment of Supplies over R. R. Co.'s lines.

Rate of payment.

party for transporting such material, merchandise and supplies to said city of Ottumwa at the rate of six (6) mills per net ton per mile for each and every mile that the same may be so as aforesaid transported by said first party.

SEC. 2. The party of the second part further agrees to pay to the said first party, at the times and in the manner hereinafter set forth, the sum of fifty thousand (50,000) dollars, in full settlement and payment for said first party's services to be hereafter rendered in transporting from said city of Ottumwa upon and over the railroad covered by this agreement, and to the end of the track thereof, wherever said end may be when such transportation is required, all the teams, tools, machinery, implements, supplies and merchandise, and all the material by him, the said second party, to be used in and about the construction of said railroad, and for the use by said second party of said first party's locomotives and cars in laying the track of said railroad; and said second party also agrees to load and unload at its own expense—except as hereinbefore in Section 1, of Article 6, expressly specified—all carload freight in this 9th Article mentioned and referred to, and to use due expedition in unloading cars on arrival at destination, and to pay the said sum of fifty thousand (50,000) dollars in eight equal installments of sixty-two hundred and fifty (6,250) dollars each; one of said installments to be due and payable to the said first party on the completion and acceptance of the first section of twenty-five miles, extending from Ottumwa southwesterly, and the remaining installments to become due and payable respectively as each succeeding section of twenty-five (25) miles of said railroad is completed and accepted.

To pay for transportation of material over road being built.

Method of payment.

ARTICLE X.

Contractor to pay for all material and labor.

SEC. 1. The said party of the second part further agrees to pay in full for all material by him furnished for the construction of said railroad, and for all

labor by him employed upon said work or any part thereof, and also to so contract for such labor as to retain from the money due therefor the amount of the board bills, if any, contracted during the performance of such labor, and to pay said board bills with the money so retained, and to save the said first party free and harmless from any and every claim, demand or lien arising from or growing out of any act or thing done or suffered by said second party, or his agents, servants and sub-contractors, and his and their employés, in, about or connected with the construction of the railroad aforesaid.

To indemnify R. R. Co. against all claims.

SEC. 2. The party of the second part further agrees that he will, during the construction of said railroad, and wherever the route of the same is traversed by public or private roads, keep open and maintain in safe condition, commodious passing places; that where said route passes through farms, he will keep up such temporary fences as may be necessary for the preservation of crops or the restraining of cattle, and that he will not take or deposit earth or other material from or on any place or places outside the right of way of the said railroad without the direction and consent of the said Chief Engineer; and said second party also agrees to hold said first party free and harmless from all loss, cost or damage, or claim therefor, to persons or property, arising from or growing out of any act or omission of any person or persons employed by or under him, or by or under his agents and sub-contractors, in the prosecution of said work or any part of it.

Road crossings.

Farm fences.

To indemnify R. R. Co.

SEC. 3. The party of the second part further agrees that he will, and he does hereby, assume all risks, loss and damage to all his property and to the property of his sub contractors, his and their employés, agents and servants; and also all risks and damage to himself, his sub-contractors, and his and their employés, agents and servants, while said property or said persons are carried free on or over the said railroad, or on or over any of the lines of railroad of the said first party; and said second party also

To assume all risks of damages to property and persons.

...e R. R. ...rmless ...damages ...idents.

agrees that he will hold said first party free and harmless from all damages and costs arising from or growing out of any of the matters assumed by him as aforesaid, or arising from or growing out of any accident or casualty to any person or persons while such person or persons are employed by said second party in constructing the said railroad.

...acts of en... ...rs of R. R.

SEC. 4. The party of the second part further agrees to hold the said first party free and harmless from any loss, expense or damage arising from or growing out of the incompetency, want of judgment, mistake, carelessness or dishonesty of any of the engineers of said first party while said engineers or any of them are, at the request of said second party, acting as umpires in settling and adjusting any question between said second party and his employés or sub contractors, as provided in Section 2 of Article 12 of this agreement.

ARTICLE XI.

...actor to ...500,000 ...ed in ma... ...and labor.

SEC. 1. The party of the second part further agrees that he will furnish and keep invested in material and labor for, in and upon the railroad hereinabove by him agreed to be constructed, built, completed and finished, and until the final completion thereof in accordance with the terms of this agreement, such an amount of money not exceeding the sum of five hundred thousand dollars, as said first party may request; and also agrees that he, the said second party, will require from said first party payment for material furnished and labor performed by him, for, in and about the construction of said railroad only so far and to such an amount as the material and labor so by him furnished and performed shall at any time or times exceed in amount, at prices hereinafter mentioned, the said sum of five hundred thousand (500,000) dollars. *Provided, however*, that the said five hundred thousand dollars shall be in lieu of all such percentages as are usually withheld from contractors until the completion of contracts, and that

...of per... ...e to be ...d.

no other or further deduction than said sum shall be made from the amounts to grow due to said second party in the prosecution of said work; *and provided, also*, that said sum of five hundred thousand dollars, or so much thereof as may then be retained by said first party, shall be paid over to the said second party on the full and final completion, in accordance with the specifications and requirements of this agreement, of all the work hereinabove by said second party agreed to be done.

To be paid on final agreement.

ARTICLE XII.

SEC. 1. For and in consideration of the payments, covenants and agreements of the party of the second part, to be by said second party made, kept and performed as hereinabove set forth, the party of the first part hereby covenants and agrees to furnish at its own cost and expense, and at such time or times as not to delay the execution of the work in this agreement mentioned and referred to, all the lands now or hereafter marked out and designated by the said first party's Chief Engineer for right of way, borrow pits, waste banks, and station grounds of all kinds as the said lands may be required for the construction of the railroad covered by this agreement.

Agreement R. R. Co.

To furnish of way.

Station grou

SEC. 2. The party of the first part further agrees that it will, through its duly authorized engineers and at its own cost and expense, do all the engineering work necessary to locate and lay out all the grading and building of said line of railroad; design and make plans of all structures required therein and thereon, and give constant engineering, superintendence and direction to all of said work until its final completion, so far as said engineering, work and supervision relate to this agreement. And said first party also agrees that, in case the said second party desires to, and shall, in writing, constitute the Chief Engineer or Assistant Engineers of the first party, umpire or umpires, to determine, decide and adjust questions concerning the measurement of quantities of work performed and the classification

Do all engi ing work, grading, &c

Design and place all structures.

Superinten ence.

C. E. & Asst. Engineers to act as umpire between con tractors and sub-contra

of material or concerning other matters which may arise between the said second party and his employés or sub-contractors, then, and in every such case, the said first party's Chief Engineer or Assistant Engineers shall so act as such umpire or umpires to decide and adjust such questions as aforesaid; *provided, however*, that the said first party shall in no wise be held liable or responsible for any loss, expense or damage entailed by or through the incompetency, want of judgment, mistake, carelessness or dishonesty of said Chief Engineer or said Assistant Engineers while so acting as such umpire or umpires as aforesaid.

Co. not liable for acts of neers, &c.

SEC. 3. The party of the first part further agrees that the said second party may, at any and all times during the prosecution of the work covered by this agreement, either personally or by his agents or engineers, thereto in writing duly authorized, examine all note and field books made by the first party's engineers, and pertaining to said work, and all the standard or other plans prepared by the said Chief Engineer for bridges, buildings and other structures required to be placed in or on said line of railroad; and may also, if he, the said second party, so request, have copies of such parts of said note or field books as he may desire, and of said plans; and said copies shall be furnished by said first party so soon as the same can be conveniently made, and without unreasonable delay.

mine and copies of neers' field plans.

ARTICLE XIII.

Co. to port laborers Ottumwa beyond.

SEC. 1. The party of the first part further agrees to transport, free of cost to said second party, over its lines of railway to the said city of Ottumwa, and from thence to the end of the track of the railroad covered by this agreement, wherever said end of track may be when such transportation is required, all the men in any manner employed by said second party in or about the construction of said railroad. *Provided*, that the said men shall be by said second party furnished with such evidence as said first second party

may prescribe of their right to free transportation as aforesaid; and *provided, also*, that said second party shall and will hold and save the said first party free, clear and harmless from all loss and damages or claims therefor, arising from or growing out of any accident or casualty to any such person so carried free over said first party's lines of railroad, or over the railroad covered by this agreement.

R. R. C... be respo... for inju... damage... cidents.

SEC. 2. The party of the first part further agrees to transport, free of cost to said second party, over its said lines of railway to the said city of Ottumwa, all the machinery, tools, implements and teams of said second party, required by him in the construction of the said railroad. *Provided*, said second party shall and will hold said first party free, clear and harmless from all costs and damages and claims therefor, arising from or growing out of any loss or injury of or to any of said machinery, tools, implements and teams while so carried free on said first party's railway.

Also to ... port all ... machine... teams, ...

R. R. no... respons... any loss...

SEC. 3. The party of the first part further agrees to transport by the shortest practical route, over its said lines of railway, from any point thereon to said city of Ottumwa, all the materials required by said second party in the construction of said railroad, and all the merchandise and other, so-called, contractors' supplies used by him in the prosecution of said work, at the rate of six (6) mills per net ton, per mile for each and every mile said material, merchandise and supplies shall be carried as aforesaid. *Provided*, that said second party shall use due diligence in unloading cars on arrival at destination.

R. R. to ... port mat... &c., for ... tractor t... Ottumwa.

Compensa... therefor.

SEC. 4. The party of the first part further agrees to transport over the line of railroad covered by this agreement, to the end of the track thereof, wherever said end may be when said transportation is required, all the material necessary for the construction of said railroad, and all the machinery, implements, tools and teams employed in and about said construction, and all the merchandise and other so-called, contractors' supplies used in the prosecution

Also to tr... port mater... over road ... constructed.

nish motive power for track.

of said work, and also agrees to furnish ample motive power and cars for laying the track of said railroad, and to accept in full settlement and payment for all the services in this Section provided to be rendered, the sum of Fifty thousand (50,000) dollars, payable in eight (8) equal installments of sixty-two hundred and fifty (6,250) dollars each, at such time and times, and in such manner as the said second party has hereinabove, in Section 2 of Article 9, of this agreement, covenanted to pay the same. *Provided, however,* that all car-load freight mentioned and referred to in this 13th Article, shall—except as hereinabove, in Section 1 of Article 6, particularly specified—be loaded and unloaded by said second party, and that in all cases due expedition shall be used in unloading cars on arrival at destination.

compensation.

Sec. 2.

Article XIV.

To sell &c., for construction of

Sec. 1. The party of the first part further agrees to sell to the said second party, all the steel rails, angle bars, track bolts and track spike required for laying all the main and side tracks mentioned and referred to in this agreement, at the prices hereinabove, in Section 1 of Article 6, agreed by said second party to be paid for the said materials, respectively. All of said material shall be, at the convenience of said first party and at the rate of six (6) mills per net ton per mile to be paid by the said second party, transported to the said city of Ottumwa, and shall be there unloaded by said second party without unnecessary delay, upon grounds for that purpose by said first party provided and designated, in case such material is not at once required for laying track; but in case said material is at once required for track laying, the same shall be forwarded, without unloading at Ottumwa, to the end of the track, and there unloaded without unnecessary delay as aforesaid. And said first party also agrees to so transport and deliver all the material in this Section mentioned and referred to, as not to hinder or delay the said second party in laying the

transport

track of the said railroad; but said sale, transportation and delivery are hereby made subject to the provisions, limitations and restrictions hereinafter set forth in Section 6 of Article 16, of this agreement.

ARTICLE XV.

SEC. 1. The party of the first part further agrees to pay to the said second party, in the manner and at the time and times hereinafter set forth, the sum of three million nine hundred fifty-four thousand six hundred dollars; which said sum shall be in full settlement, payment and satisfaction of all and every claim and demand of said second party upon or against the said first party, for building, constructing and fully completing, in strict conformity to the stipulations, specifications and requirements hereinabove mentioned and referred to, the said railroad, in this agreement proposed and agreed to be built; and the said payment and payments shall be made as follows, to-wit:

Payments

Contract

Full payment

As soon as practicable after the fifteenth (15th) day of each and every month from and after the commencement of the work herein by said second party agreed to be done, the said Chief Engineer shall furnish to said first party a certificate and estimate of the total amount and value of the various kinds of work done and material delivered, in the work or on said first party's grounds, up to the said fifteenth day of the month; which said estimate shall be made upon the basis hereinafter mentioned and set out in Section 1 of Article 18, of this agreement. And on or about the first (1st) day of the month then next ensuing, the said first party shall pay to the said second party the total amount of said estimate, *less* the amount theretofore paid to said second party on account of any previous estimate, and *less* the sum of five hundred thousand dollars, which last named sum the said second party has hereinabove (in Section 1, of Article 11), agreed to invest and to keep invested in

Manner of payment.

material and labor for the construction of the railroad aforesaid until the full and final completion thereof in accordance with the terms of this agreement; it being the understanding and intention of both the parties hereto that the said second party shall, until the said final completion of all the work mentioned and specified in this agreement, receive payment only for such material and labor required in the prosecution of said work as he, the said second party, may furnish and perform in excess of said sum of five hundred thousand dollars; and that said last mentioned sum shall be paid to said second party at the final completion of said work, and not until then, and that no other or further deduction than as aforesaid shall be made from any of the estimates hereinabove referred to.

SEC. 2. The party of the first part further agrees that whenever the said Chief Engineer shall furnish to it, the said first party, his certificate that all the stipulations and covenants in this agreement contained, to be by the said second party kept and performed, have been by said party well and truly observed and carried out, and that the said first party's railroad herein proposed and agreed to be built, has been by said second party constructed, built, completed and finished, in all respects, in full conformity with the covenants and agreements hereinabove in that behalf made by said second party, and shall with said certificate also present his, the said Chief Engineer's estimate of the amount and value of the various kinds of work done by said second party under the terms of this agreement—which said estimate shall be final and conclusive between the parties hereto—then the said first party shall and will pay to the said second party the sum or sums, if any, shown by said final estimate to be due to said second party under the terms of this agreement, and will also pay so much of the said sum of Five hundred thousand (500,000) dollars theretofore retained by said first party as has not been previously paid to said second party. *Provided,*

that the entire amount of compensation so to be paid to said second party as in this Article provided, shall not exceed the said sum of three million nine hundred fifty-four thousand six hundred dollars.

ARTICLE XVI.

SEC. 1. It is hereby mutually understood and agreed by and between the parties hereto that whenever, in the opinion of said Chief Engineer, minor changes can be made in the present located line of the railroad, so as aforesaid agreed to be constructed and built, whereby the cost of the construction thereof can be reduced, then, and in every such case, upon the written request of said second party to the said Chief Engineer, such minor changes may be made. *Provided*, that the line, when so changed, shall not exceed the present located line in length, grades or rates of grade, or in length or degree of curve; and *provided, further*, that said second party shall pay the entire cost of the right of way for the new line, in case said first party has secured and paid for the right of way for the line as located prior to such change; and *provided, also*, that any such changes, whenever made, shall be platted on both copies, hereinabove referred to, of the profile of said railroad, and be authenticated thereon by the respective signatures of the said Chief Engineer and of the duly authorized agent of said second party. Changes.

SEC. 2. It is further mutually understood and agreed by and between the said parties, that the profile mentioned and referred to in Section 1 of Article 2, of this agreement, shall be deemed and taken to show only the grade lines drawn thereon and the approximate ground heights in relation to the said grade lines at the stations marked on said profiles; and that all other figures, quantities and marks on said profile indicated, shall be, and the same are hereby understood and declared to be, of no force or value whatever in the interpretation of this agree- Grades changed.

ment or any part thereof; nor shall either party hereto be bound or in any manner concluded by said other figures, quantities and marks so as aforesaid on said profile indicated; nor shall said figures, quantities and marks be understood or considered as in any wise altering or changing any of the covenants or agreements hereinabove by said second party made.

Extra work.

Must be required by Chief Engineer in writing.

SEC. 3. It is further mutually understood and agreed by and between the said parties that, in case the said second party shall be by said Chief Engineer required, in writing, to furnish any material or to do any work not hereinabove required of, and agreed to be furnished or performed by, said second party; or in case the said second party shall in like manner be required by the said Chief Engineer to furnish and erect any structure of a more expensive design or plan than that called for by the standard plans of said first party, and hereinabove by said second party agreed to be furnished and erected, then, and in every such case, the second party shall furnish such material or do such work, or shall furnish and erect such more expensive structure as aforesaid, as the case may be, and shall receive from said first party such just and reasonable compensation for such material or work, or for such more expensive structure so as aforesaid required of him, as the said Chief Engineer shall fix and determine.

Engineer to fix compensation.

Material for grading terminal station grounds.

SEC. 4. It is further mutually understood and agreed by and between the said parties that if, in the opinion of the said Chief Engineer, it is impracticable or unadvisable to obtain the material for grading either or both of the division terminal station grounds hereinabove, in Section 1 of Article 5, referred to, within a haul of one thousand (1,000) feet from the place or places where such material is required to be deposited on said grounds, then, and in such case, the said second party shall take such material from such point or points nearest to said grounds so to be

graded, and on or along the said first party's present railway, or on or along the railroad herein proposed to be constructed, as the said Chief Engineer may direct, and shall pay to said first party such just and reasonable compensation for the use of its engines and cars in hauling said material as said Chief Engineer may deem fit and proper, and said first party shall and will furnish its engines and cars for this purpose.

SEC. 5. It is further mutually understood and agreed by and between the said parties, that wherever there are excavations forming the prism of the said road, which said excavations are not, in the opinion of the said Chief Engineer, wholly solid rock, then the same may be by him laid off, cross-sectioned and staked out, as if wholly earth excavations; and if in the execution of said work it should prove that the said excavations were partly of earth and partly of rock, and if by reason of the existence of said rock the width of such excavation might have been made less than the width originally laid off and staked out as aforesaid, and that when so narrowed the slope thereof would still conform to the hereinbefore specified and required inclinations of earth and rock in excavations, the said second party shall have and shall make no claim or demand on said first party for compensation for any excavations by said second party made in accordance with the aforesaid original laying off and staking, even though any part of such excavations should prove to have been, for the reason aforesaid, unnecessary.

Excavation

SEC. 6. It is further mutually understood and agreed by and between the said parties that the said first party has contracted with manufacturers esteemed to be safe, responsible and reliable, for all the steel rails, angle-bars, track-bolts and track-spikes, which it, the said first party, has hereinabove (in Section 1, of Article 14) agreed to sell and deliver to said second party; and that all of said contracts contain the usual and customary clause by which said manufacturers are not held liable in damages

As to material to be furnished

for failure to deliver at the times specified in said contracts the articles by them manufactured, when such failure or delay is caused by strikes of workmen, injury to or destruction of their works by fire, or by the elements, or by other causes beyond their control. *It is therefore expressly understood and agreed* that the said second party accepts the above mentioned conditions in said contracts contained, and that the delivery by said first party of said rails, angle-bars, bolts and spikes shall be subject as to the time of such delivery, to the said above-mentioned conditions, and that said first party shall be bound to deliver the said rails, bars, bolts and spikes only when and as received from the manufacturers thereof as aforesaid, and shall not be liable for any failure or delay in delivery when the same is beyond said first party's power to control. *And it also mutually agreed* that in case of any such failure or delay, as aforesaid, by which said second party is hindered or delayed in laying track, the said second party may require, and the said first party shall grant such just and reasonable extension of time for the completion of the said railroad as said Chief Engineer may deem fit, and such extension of time shall be the only remedy or relief which said second party may or shall claim from said first party for any delay so as aforesaid caused.

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SEC. 7. It is further mutually understood and agreed that the said track material so as aforesaid to be sold and delivered to said second party, shall be paid for by said second party, or shall be charged to him, when and as delivered; and if so charged the amount of such charge shall be deducted from the amount shown by any monthly estimate, in which such material is included, to be due to said second party. And it is also mutually agreed that the said second party shall and will pay to the said first party all freight charges on material, merchandise and contractors' supplies, so called, carried under the provisions of this agreement, as and when such charges accrue. *Provided, however*, that all

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charges for carrying material, merchandise and supplies from Ottumwa to the end of the track of the railroad herein proposed and agreed to be built, shall be included in the said sum of fifty thousand dollars mentioned and referred to in Section 4 of Article 13 of this agreement.

ARTICLE XVII.

SEC. 1. It is further mutually understood and agreed by and between the said parties, that if from any cause whatever any portion of the work, or any of the structures hereinabove mentioned and referred to, is or are injured or destroyed before its or their final completion and acceptance, as hereinafter provided, or in case any of the embankments or excavations are not, at the time of such acceptance as aforesaid, in full accordance in all respects with the specifications and requirements hereinabove set forth, then, and in every such case, each and every of said work, structures, embankments and excavations so as aforesaid injured or destroyed, or not in full conformity to the specifications and requirements aforesaid, shall be restored, repaired and completed by the said second party, and at its sole cost and expense, to the full satisfaction of the said Chief Engineer, before the said first party shall be required to finally accept the same.

Injury to ... before ... tion.

To be ... by con...

SEC. 2. It is further mutually understood and agreed by and between the said parties that the railroad in this agreement proposed to be built shall be completed in seven sections of twenty-five continuous miles each, and one section of twenty-seven and eight-tenths ($27\frac{8}{10}$) continuous miles, the first of said sections to commence at said city of Ottumwa; and when and as so completed in accordance with the terms of this agreement, and to the satisfaction of said first party's Chief Engineer, as hereinabove provided, the same shall be turned over to and accepted by the said first party. *Provided, however*, that the said first party may in its

Road to ... complete... 25-mile ... tions.

may operate section before completed.

discretion accept and operate any such section before the same is fully completed as hereinbefore specified and required; and in any and every such case said first party may retain from the amount due and payable to the said second party on the completion of said section, such sum or sums as will, in the opinion of the said Chief Engineer, amply suffice to complete the said section of railroad in full accordance with the requirements of this agreement; and said second party shall and will, as directed by the said Chief Engineer, finish and complete said section in full conformity to the requirements hereinbefore made, and upon such completion shall be entitled to receive the sum or sums so as aforesaid by said first party retained for this purpose.

n to be re-ed to plete.

ntractor to responsible damages by cident to s, &c., before mpletion of d.

SEC. 3. It is further mutually understood and agreed by and between said parties, that in case any accident shall occur on or to any train or trains, engine or engines, car or cars, of said first party while the same are running on any portion of the railroad herein proposed and agreed to be constructed, before said portion of said railroad shall be turned over to and accepted by the said first party, then, and in every such case, the said second party shall alone be responsible for all loss, cost and damage caused by said accident, unless the same shall have resulted from defects in the motive power or cars of said first party.

ARTICLE XVIII.

onthly timates.

SEC. 1. It is further mutually understood and agreed by and between the said parties, that the monthly estimates provided for and referred to in Section 1 of Article 15 of this agreement shall be made by the said Chief Engineer on the basis of the relative value of the work then done to the whole work herein contemplated when the same shall be completed at the contract price hereinabove (in Section 1 of Article 15) mentioned; and that for this purpose, in the commencement of said work, and

sis of.

until the said Chief Engineer shall have more definite knowledge of the approximate quantities of the various kinds of work required for the completion of the railroad hereinabove proposed and agreed to be built, said monthly estimates shall be made at the following prices for the several items estimated as done at the time of making such estimates, to wit:

Excavation and embankment (on basis of 1,000 feet haul)		23½ cts.	per cu. yd.
Loose rock		50 "	"
Solid rock	$ 1	20 "	"
Bridge masonry, including foundations	12	00 "	"
Bridge timber, framed and erected	35	00 "	M.
Culvert timber, in place	25	00 "	"
Bridge ties and guard rails	35	00 "	"
Crossing plank	20	00 "	"
Piles, driven		34 cts.	per lineal ft.
Piles, cut off		20 "	"
Howe Truss, 40 ft. span	21	00 "	"
Howe Truss, 80 " "	25	00 "	"
Howe Truss, 100 " "	28	00 "	"
Howe Truss, 124 " "	31	00 "	"
Howe Truss, 150 " "	35	50 "	"
Plate girder	15	50 "	"
Wire fencing		70 cts.	per rod.
Clearing	50	00	per acre.
Cattle guards	50	00	per pair.
Water tank, with pump and boiler	1,800	00	each
Station houses, including platforms	2,500	00	"
Coal sheds	1,500	00	"
Tool houses	50	00	"
Section houses	700	00	"
Round houses, 12 stalls	15,600	00	"

Basis for monthly mates.

Turn-tables	2,500 00	each
Crossing frogs, per set	500 00	"
Cross ties	42 cts.	"
Iron truss bridge, erected	05 "	per lb.
Track laying	250 00	per mile.
Surfacing	175 00	per "
Track material not mentioned above, including a due proportion of side tracks, switches and frogs	4,970 00	per mile.

SEC. 2. It is further mutually understood and agreed by and between said parties that whenever the said Chief Engineer shall, in his opinion, have more definite knowledge of the total quantities of the several items, in the preceding section of this Article enumerated, required to complete the whole work in this agreement contemplated, he shall then so adjust and revise said prices for items included in monthly estimates that their aggregate, at the prices so revised, shall not exceed, but shall closely approximate the consideration hereinabove (in Section 1 of Article 15) named for doing the whole work.

Estimates to be revised.

SEC. 3. It is further mutually understood and agreed by and between the said parties that the said first party shall not be expected or required to estimate any material furnished by the said second party for the construction of said railway, unless the same shall be in the work, or shall be piled upon the ground of said first party as said Chief Engineer may direct; and that in estimating material not in its place in the work, the said Chief Engineer shall put such value thereon as to him shall seem just and proper.

Estimates of material.

SEC. 4. It is further mutually understood and agreed by and between the said parties that in making monthly estimates as aforesaid, the rules and regulations for determining amounts and quantities set out in the printed "General Specifications," so called, of the said first party shall be observed and

Method of estimating.

followed so far as the same or any of them do not conflict with the terms of this agreement; and it is also understood and agreed that in accepting as finished and completed any section of the aforesaid railroad, as provided in Section 2 of Article 17, the said first party shall only be required to pay for the same on the basis of the relative value of all the work done on the section so accepted to the whole work in this agreement contemplated to be done.

ARTICLE XIX.

SEC. 1. It is further mutually understood and agreed by and between the said parties, that the party of the first part may, if it so elect, establish the southwestern terminus of the railroad, in this agreement contemplated, at an abutment for a bridge crossing of the Missouri river at Randolph's Bluff, a point, approximately, three and forty five one-hundredths ($3\frac{45}{100}$) miles east of Harlem Station aforesaid instead of at said last named place. In the event of such election, as aforesaid, the said second party shall, upon receiving reasonable notice, build said railroad to the new terminus so established instead of building the same to said Harlem Station; and the said Chief Engineer shall ascertain, and shall estimate at the item prices set out in Section 1 of Article 18, hereof—except that track material shall be estimated on basis of $3,969 per mile, instead of $4,970 per mile, the quantities of each and every kind and class of work required for the line as now laid out to the said Harlem Station and for the line, as the same shall be laid out to the said Randolph's Bluff, and the difference so ascertained in the cost of constructing the two lines aforesaid, shall, as the case may require, be deducted from or added to the price hereinabove (in Section 1 of Article 15) by said first party agreed to be paid to the said second party for constructing the entire line of said railroad.

R. R. may change S. W. terminus to Randolph's Bluff.

Contractor to build to new terminus.

Estimate by C. E. of difference of cost

Article XX.

Sec. 1. It is further mutually understood and agreed by and between the said parties that the Chief Engineer of the party of the first part may, in writing or by printed circular, authorize and empower such and so many Assistant Engineers as to him shall seem advisable, to discharge any of the duties and to exercise any of the powers herein, in this agreement, devolved upon or reserved to the said Chief Engineer; and that the orders and directions of the said Assistant Engineers, so as aforesaid authorized and empowered, shall be respected and obeyed by said second party, his agents, sub-contractors and employés, so far as said orders and directions may relate to any matters covered by this agreement, and shall not contravene the terms thereof.

Sec. 2. It is further mutually understood and agreed by and between the said parties that the said second party shall not and will not in any manner assign or transfer this agreement without the written consent of the said first party, but shall and will constantly superintend, in person, or by his duly authorized agent or agents, all the work hereinabove by him agreed to be done in or about the building and constructing of the railroad in this agreement contemplated.

Sec. 3. It is further mutually understood and agreed by and between said parties that the copies (hereinabove in Section 1 of Article 2 mentioned and referred to), of the profile of the railroad in this agreement contemplated, shall, so soon as practicable, be examined, compared and duly authenticated by the proper agents of the parties hereto, and that when said copies are so authenticated by the signatures of the Chief Engineer of the said first party and the duly authorized agent of the said second party, respectively, then this agreement shall be and become of full force and effect.

ARTICLE XXI.

SEC. 1. It is further mutually agreed by and between the said parties that, to prevent all disputes and misunderstandings between them in relation to any of the covenants or stipulations contained in this agreement, or to their performance by either of said parties, the Chief Engineer of the first party shall be, and hereby is made, an umpire to decide all questions arising from or growing out of this agreement; and the decision of said Chief Engineer on any question or matter touching this agreement shall be final and conclusive between the parties hereto, and each of said parties hereby waives any and all right of action, suit or suits, or other remedy, in law or otherwise, under this contract, or arising out of the same.

Chief Engineer of R. R. Co. umpire and decide questions.

Waives rights.

SEC. 2. It is further mutually agreed by and between said parties, that if, in the opinion of the said Chief Engineer, said second party shall have failed or refused to comply with any of the stipulations contained in this contract to be by him performed, said first party shall have the right, by its General Manager, to cancel this contract and declare the same void; in which event said second party shall have no claim whatever on said first party for damages, compensation or percentage retained by said first party as hereinafter provided, either for material or work; but said first party shall have the right to take possession of and hold said material and work absolutely, and shall be absolved as entirely and completely from this contract as if the same had never been made.

SEC. 3. It is further mutually agreed by and between said parties, that if said second party shall at any time neglect or refuse to progress with the work as fast—in the opinion of said Chief Engineer, communicated in writing to said second party—as may be necessary for its completion by the time specified herein, then said first party, by its General Manager, may declare this contract abandoned, and the amount which shall have been retained at the time out of

556 the monthly estimates, which would have become due at the completion of this contract, shall be forfeited to said first party; or said first party may, at the option of its General Manager, employ other parties to execute any part of the work and charge the cost of the same to the said second party, to be deducted from such retained percentage, or from any payment that shall have become due on any former estimates, or that may become due on any subsequent estimates. *And, whereas*, said second party has agreed to pay in full for all labor employed upon the work and to contract for such labor so as to retain from the money due therefor, the amount of the board bills contracted during the per-
557 formance of such labor, and to pay said board bills with the money so retained, it is mutually agreed by and between said parties that whenever, in the opinion of the said Chief Engineer, it may be necessary to secure the aforesaid payment for labor, then said first party is authorized to pay said labor in the same manner that said second party has agreed to pay the same, and all money so paid shall be deducted from the amount which may be payable to the said second party.

SEC. 4. It is further mutually agreed by and between said parties that whenever, in the opinion of the said Chief Engineer, it may be necessary to stop, either temporarily or permanently, any of the work
558 or to diminish the force employed, said first party, by its said Chief Engineer, shall have the right to do so, and the said party of the second part shall have no claim for damages, but shall immediately stop the work, whether temporarily or permanently, or diminish the force, as the said Chief Engineer may direct, in which event the party of the second part shall be entitled to such extension of time for the completion of the work, if and when the same shall be resumed, as said Chief Engineer may decide is just and proper.

IN WITNESS WHEREOF, the party of the first part has caused this agreement to be signed by its Gen-

eral Manager, and its corporate seal to be hereto at- 559
tached and attested by its Secretary; and the party of the second part has hereunto set his hand and seal, the day and year first above written.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

By

ROSWELL MILLER,

[CORPORATE SEAL.] General Manager.

Attest:

P. M. MYERS,

Secretary.

HEMAN CLARK.

In presence of 560

W. S. MILLIGAN,

S. H. CROLINS,

As to first party,

and

H. C. WESTON,

C. B. FERRY,

As to second party.

In Article 15, near the beginning and at the end, the amount $3,914,600 was changed so as to read $3,954,600 (three million, nine hundred fifty-four thousand, six hundred dollars) before delivery of this contract.

HEMAN CLARK. 561

I, P. M. MYERS, secretary of the Chicago, Milwaukee and St. Paul Railway Company, do hereby certify that I have compared the foregoing and attached printed copy of an agreement made on the 6th day of March, 1886, by and between the said railway Company and Heman Clark, with the original agreement on file in my office, and that the same is a full, true and complete copy of said original agreement, and of the whole thereof, except

562 the "Bridge Specifications" mentioned and referred to in Section 1 of Article III.

In witness whereof, I have hereunto set my hand and affixed the Seal of said
[SEAL.] Company, at its Office in the City of Milwaukee, this 22d day of October, A. D., 1894.

P. M. MYERS,
Secretary Chicago, Milwaukee & St. Paul Ry. Co.

FIFTH.

The said contract and agreement was executed on behalf of the defendant, the Chicago, Milwaukee
563 and St. Paul Railway Company, by Roswell Miller, its general manager, at Milwaukee, Wisconsin, on or about the 6th day of March, 1886, and at the time it was so executed by *him*, the consideration expressed in Article XV. of said contract to be paid by the defendant Railway Company to said Heman Clark in full settlement, payment and satisfaction of all and every claim and demand of the said Clark against the said Railway Company, for building, constructing and fully completing the railroad therein agreed to be built in strict conformity with the stipulations, specifications and requirements mentioned and referred to in said contract, was the sum of $3,914,600, and the date of completion speci-
564 fied in the said contract was the first day of August, 1887.

Given. GEO. HOADLY, Referee.

SIXTH.

The amount of the consideration so expressed, namely, $3,914,600, was the equivalent of $19,500 per mile for 202.8 miles, being $3,954,600, less the sum of $40,000, which had been agreed upon as the difference in price to be paid if the road was not completed by the first of August, 1887, instead of the first of June, 1887.

Refused. GEO. HOADLY, Referee.

SEVENTH.

After the said contract had been executed in duplicate on behalf of the defendant Railway Company as aforesaid, by the said Roswell Miller, it was forwarded to the City of New York, to be executed by the plaintiff.

Refused. Immaterial. GEO. HOADLY, Referee.

EIGHTH.

At the time of the execution and delivery of the said contract by the plaintiff, Heman Clark, the consideration expressed in the said contract in Article XV. was changed by an alteration therein so as to make the said consideration expressed to be the sum of $3,954,600 instead of $3,914,600; but the date for the completion of the work under the said contract was not changed, but remained the first day of August, 1887.

Given. GEO. HOADLY, Referee.

NINTH.

At the time the said contract was so signed and executed by the plaintiff, Heman Clark, in the City of New York, and the said change and alteration in the amount of the consideration was made, the said Roswell Miller, the General Manager of the defendant Railway Company, was not present, and afterwards, immediately upon his receiving the copy of the said contract executed by the said Heman Clark, of which a copy is hereinbefore annexed, marked "A," and upon discovering that the said change in the amount of the consideration had been made, the said Roswell Miller wrote to the said Heman Clark a letter dated the 19th day of March, 1886, as follows:

"MILWAUKEE, March 19, 1886.

HEMAN CLARK, Esq.,
2066 Fifth Avenue,
New York.

Dear Sir:

I think there is some misunderstanding as to the consideration to be paid to you. When Mr.

568 Hegeman's despatch arrived here the other day, Mr. Kimball was absent and I could not lay my hands on the proposition you made dated January 26th. I telegraphed in reply that the consideration was to be $19,500 per mile, understanding the contract to require completion June 1st, 1887. I find, however, that the contract was made for completion August 1st, and therefore the consideration should be $3,914,600, instead of $3,954,600. You will readily see this from the fact that your written bid of January 26th was $3,990,000 June 1st, $3,950,000 1st of August, while the contract as signed was $3,954,000 or $40,000 more than you offered to do the work for. The agreement was $19,500 per mile completed June 1st; $40,000 off if allowed to August 1st.

569 Yours truly,

ROSWELL MILLER,
Gen'l Manager."

Refused. GEO. HOADLY, Referee.

The above is evidence, not a conclusion.

TENTH.

Afterwards, on April 1, 1886, the said Roswell Miller telegraphed to the plaintiff Heman Clark at New York that they were perfectly willing to let the compensation stand as it was, completion to be June 1st, and if at any time he desired till August first,
570 he could have the additional two months, the compensation to be reduced $40,000, as stated in his proposition, upon communicating the same to him, the said Miller, in writing.

Given. GEO. HOADLY, Referee.

ELEVENTH.

Thereupon the plaintiff Clark telegraphed to the said Roswell Miller, general manager of the defendant company: "Your understanding correct. Will forfeit $40,000 if road not completed June first."

Given. GEO. HOADLY, Referee.

TWELFTH. 571

The work was not commenced under the said contract until said agreement to forfeit the said sum of $40,000 if the road was not completed by the first day of June, 1887, instead of the first day of August, 1887, the date stated in said contract for the completion of the same was made.

Refused. Immaterial. GEO. HOADLY, Referee.

THIRTEENTH.

Thereafter, the plaintiff, through various sub-contractors employed by him from time to time during the years 1886, 1887 and 1888 proceeded with the execution of the work provided to be done and performed by him under and in accordance with the 572
provisions of the said contract; but the work under the said contract required and agreed to be done and performed by the plaintiff as provided by said contract, was not done or completed by him either by the first of June, 1887, or by the first day of August, 1887.

Given. GEO. HOADLY, Referee.

FOURTEENTH.

Pursuant to the provisions of Article XIX. of the said contract, the southwestern terminus of the said railroad agreed to be built by the plaintiff under said contract was changed to the abutment of a 573
bridge built by the defendant Railway Company crossing the Missouri River at a place called Randolph's Bluffs, a point approximately 3.45 miles east of Harlem Station, the original point of termination mentioned in the contract, notice of which change was reasonably given by the defendant to the plaintiff, to which point, in the event of such change, the plaintiff, in and by said contract, agreed to build said railroad instead of building the same to Harlem Station; it being provided that the amount of compensation to be paid to the plaintiff should be reduced for the difference in the cost of construc-

574 tion of the said line to the said bridge at Randolph's Bluffs, instead of said Harlem Station, as provided in Article XIX. of the said contract.

Refused as immaterial. GEO. HOADLY, Referee.

FIFTEENTH.

The plaintiff continued the work of the construction of the said railroad agreed to be built by him under the said contract, by various sub-contractors employed by him, until on or about the 12th day of July, 1887, when the said work, being unfinished and uncompleted, a further agreement was made by and between the plaintiff and the defendant Rail-
575 way Company, dated the said 12th day of July, 1887, whereby the Railway Company agreed that it would take certain of the work required to be done in and by the said original contract between it and the said Clark, and that it would perform all the labor and do all the work necessary to surface, ditch, raise and widen the banks of said railroad from the Des Moines River Bridge at Ottumwa, to a point near Newtown, in the State of Missouri, a distance of about seventy-seven miles from Ottumwa, including the widening of Fisher Cut required by the contract of March 6, 1886, and that it would also perform all the labor and do all the work necessary to surface the track, and do all ditching, all widening and
576 raising of banks from the said point near Newtown, to the southerly end of the track as it was laid at the time of the execution of the said agreement, in the vicinity of Cowgill, about seventy-one miles from Newtown, and that it would perform all the labor and do all the work necessary to surface the track, and do all the ditching required from said point at or near Cowgill to the Missouri River, in consideration of which the plaintiff agreed that he would pay the Railway Company for all work performed under the said agreement at certain prices therein stated per mile, said payments to be made by a deduction from the amount due or to become

due to the said Heman Clark under and in pursuance of said contract of March 6, 1886. 577

And the plaintiff agreed to complete and perform the other work required of him by said contract of March 6, 1886, and it was provided that the said agreement was not intended to and did not relieve the said plaintiff from fully performing and carrying out to completion the said contract of March 6, 1886, in all respects, except as to the work therein particularly specified to be performed by the defendant Railway Company.

Refused as immaterial. GEO. HOADLY, Referee.

SIXTEENTH.

The plaintiff Heman Clark did not complete the work of track laying upon the said line of railroad agreed as aforesaid to be built and constructed by him under the said contract of March 6, 1886, until on or about the first day of November, 1887, and did not finally complete and turn over the said road to the defendant Railway Company as fully constructed and completed, and the said work and line of railroad was not finally accepted by the said defendant Railway Company as fully completed and finished, as provided by the said contract of March 6, 1886, until on or about the 3d day of March, 1888. 578

Given. GEO. HOADLY, Referee.

SEVENTEENTH. 579

In and by Section 1 of Article 15 of the said contract as altered, as hereinbefore stated, it was provided that the said Railway Company would pay to the plaintiff Heman Clark in the manner and at the time and times therein set forth the sum of $3,954,600 (which was subject to the modification or deduction of $40,000 hereinbefore stated, in case the work and the road should not be completed by June 1, 1887), which sum should be in full settlement, payment and satisfaction of all and every claim and demand of

said Heman Clark upon or against the said Railway Company for building, constructing and fully completing, in strict conformity to the stipulations, specifications and requirements in said contract mentioned and referred to, the said railroad in the said agreement proposed and agreed to be built; which said payments should be made in the manner therein specified, namely, that, as soon as practicable after the 15th day of each and every month from and after the commencement of the work agreed to be done, the Chief Engineer of the said Railway Company should furnish to it a certificate and estimate of the total amount and value of the various kinds of work done and material delivered in the work, or on the grounds of the Railroad Company, up to the 15th day of the month, which said estimate should be made upon the basis mentioned and set out in Section 1 of Article 18 of the said contract; and on or about the first day of the month then next ensuing the said Railway Company should pay to the said Heman Clark the total amount of said estimate, less the amount theretofore paid to him on account of any previous estimate, and also less the sum of $500,000, which the said Clark had agreed (in Article 11 of said contract) to invest and keep invested in material and labor for the construction of the said railroad until the full and final completion thereof, in accordance with the terms of the said agreement.

Refused. Immaterial. GEO. HOADLY, Referee.

EIGHTEENTH.

By Section 2 of Article 15 of the said contract it was further agreed by the said Railway Company that whenever the Chief Engineer of the said Railway Company should furnish to it his certificate that all the stipulations and covenants in the said contract and agreement contained, to be by the said Heman Clark kept and performed, had been by him well and truly observed and carried out, and that the said railroad therein proposed and agreed to be

built had been by said Heman Clark constructed, built, completed and finished in all respects in full conformity with the covenants and agreements in that behalf made by said Clark, and should with said certificate present his, the said Chief Engineer's, estimate of the amount and value of the various kinds of work done by the said Clark under the terms of said contract, which said estimate, it was provided and agreed, should be final and conclusive between the parties to the said agreement, then the said Railway Company would pay to the said Heman Clark the sum or sums, if any, shown by the said final estimate to be due to said Clark under the terms of the said agreement, and would also pay so much of the said sum of $500,000 theretofore retained by said Railway Company as had not been previously paid to said Clark, provided that the entire amount of compensation so to be paid to the said Heman Clark should not exceed the sum of $3,954,600.

Refused as immaterial. GEO. HOADLY, Referee.

NINETEENTH.

During the progress of the said work by the plaintiff Heman Clark, under the said contract, the Chief Engineer of the Railway Company did, pursuant to the provisions of Section 1 of Article 15 of the said contract, make from time to time, and deliver to the Railway Company, monthly certificates and estimates as therein provided, of the amount and value of the various kinds of work done and materials delivered in the work by the plaintiff during each month, in the manner and upon the basis as provided in Article 18 of the said contract and agreement, viz.: upon the basis of the relative value of the work then done to the whole work contemplated, when completed, at the total contract price; which estimates, prior to the final estimate hereafter mentioned, amounted in all to the sum of $3,867,734.01, and upon and on account of which estimates payments were made from time to time by the Railway Company to the said Heman Clark in money, and

586 materials furnished by the Railway Company to said Clark for use in the construction of the said railroad, and in labor and transportation, as provided by, and in accordance with the terms of the said contract.

Given. GEO. HOADLY, Referee.

TWENTIETH.

On or about the third day of March, 1888, D. J. Wittemore, who was the Chief Engineer of the defendant the Chicago, Milwaukee and St. Paul Railway Company, duly made and delivered to the said Railway Company, under and pursuant to the provisions of the said contract and agreement between
587 the plaintiff and the defendant hereinbefore mentioned, his final estimate and certificate of the amount and value of the work done and materials used by said Heman Clark in building the said line of railroad from Ottumwa, Iowa, to the Missouri River Bridge, at Randolph Bluffs, Missouri, under his said contract of March 6, 1886, including all extra work done by said Clark, which said certificate is in the words and figures following:

"CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.,

"Chief Engineer's Office,

"Room 51, Chamber of Commerce, Milwaukee,
March 3, 1888.

588 "I hereby certify that the statement herewith attached is the final estimate of the amount and value of the work done and materials used by Heman Clark in building the Kansas City line from Ottumwa, Iowa, to the Missouri River Bridge abutment at Randolph Bluffs, Missouri, under his contract with this Company, dated March 6, 1886, including all extra work done by said Clark, and that the said Railroad agreed to be built in and by the said contract has been by said Heman Clark constructed, built, completed and finished in all respects in full conformity with the agreements of said con-

tracts, except as the said Railway Company, party 589
of the first part, has, by agreement with said Clark, assumed the construction and completion thereof, and the compensation therefor agreed upon has been deducted in said estimates from the amount which would have been due and owing to said Clark had he completed all of the said work.

"In making the monthly estimates, and in this final estimate, no deduction has been made for any part of the $50,000 mentioned in Section 4 of Article 13 of the contract, and the amount in that article specified should be charged against the estimates as made.

"I am also informed that a contract, subsequent to the original contract, was made by which $40,000 590
was to be deducted from the contract price in case the work was not completed by June 1, 1887, instead of August 1, 1887, as specified in the contract. The work was not completed until after August 1, 1887, but no deduction of said $40,000 has been made in the estimates. Separate bills for these amounts are made and herewith returned.

"D. J. WITTEMORE,
"Chief Engineer."

Given. GEO. HOADLY, Referee.

TWENTY-FIRST.

Attached to the said certificate and made a part thereof was the statement therein referred to, of 591
which the following is a copy, together with certain statements and memoranda or vouchers for the different items therein specified, as therein stated:

"THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. To HEMAN CLARK, Residing at New York City, Dr.

"1888, Mar. 3.

"For Estimate of work done and material furnished up to date, in building Kansas City Line, from Ottumwa Jct., Ia., to Missouri River, near Kansas City, Mo., as per contract, as follows:

"As per contract price..... $3,954,600 00

592 "From which certain deductions should be made, as per statement marked 'A,' attached, as follows:

"For difference between cost of line to Harlem and of line built to Missouri River Bridge..... $39,226 44

"For surfacing track, taken off Heman Clark's hands by C., M. & St. P. Ry., as per Supplt'l Contract, Dated July 12, '87, viz.:

593 "88 $\frac{96}{100}$ miles, from Des Moines River to point near Newtown, Mo., at $100.00 ..... 8,806 00

"126 miles from point near Newtown, Mo., to Missouri River, at $250.00.. 31,500 00

"For the following buildings, which the C., M. & St. P. Ry. release Heman Clark from building, viz.:

594 "3 station houses @ $2,300 ..... $6,900 00

"2 station houses @ $2,500 ..... 5,000 00

"1 station house 2,200 00

——— 14,100 00

"5 coal sheds @ $1,300... 6,500 00

"1 section house 700 00

"For the C., M. & St. P. Ry. agreeing to build 868 rods fencing covered by Heman Clark contract, at

15 cts. per rod; H. Clark having turned over to the C., M. & St. P. Ry. 895 posts and 4,340 lbs. (41 spools) wire, the same being the amount required in building the above 868 rods fence....	$130 20	595
"For the C., M. & St. P. Ry. agreeing to build in culverts under the H. Clark contract; 13,000 ft. b. m., timber at $6.00 per M. ft. Heman Clark having turned over to the C., M. & St. P. Ry. the 13,000 ft. timber required for this work ----------	78 00	596
"For the C., M. & St. P. Ry. agreeing to furnish and set 48 whistling posts, under the H. Clark contract, at 1.45 per post ----------	69 60	
"For the C., M. & St. P. Ry. agreeing to spike track on bridges, under the H. Clark contract, as per list attached and marked A "1," as follows: 3,194 ties at $5\frac{3}{10}$c. .	169 28	597
"For work done by the C., M. & St. P. Ry. Co. to complete steam heating in Chillicothe Round House, as per H. Clark contract, which was left undone by contractor, as per statement attached and marked A 2..	16 64	

598	" For Heman Clark's proportion of ditching at Liberty Cut, as per statement attached and marked A 3.....	$382 29	
	" For amount expended by the C., M. & St. P. Ry. in putting in drain for Ottumwa Round House and T. Table, as per statement attached and marked A 4.....	289 17	
599	" For amount expended by the C., M. & St. P. Ry. in putting in drain for Chillicothe Round House and T. Table, as per statement attached and marked A 4.....	801 66	
	" As contractor has not laid to within $\frac{37}{100}$ miles of the required number of miles of side track, we are to deduct cost of material, &c., for same, as per statement attached and marked A 5.....	1,603 49	
			$104,372 77
600	" Forward.....		$3,850,227 23
	" Add for items not covered by contract, as per statement attached and marked " B," viz.:		
	" Extra length of Lawson Girder.....	$300 00	
	" Enlargement of Liberty Station building.....	350 00	
	" 344 c. y. Rip-rap, at $1.50	516 00	
	" 109 c. y. Slope Wall at 1.75.....	190 75	

"C. y. stone ballast 44,639			601
"Less amount used in foundations of Sta's and Sec. Houses $1,242			
43,397 c. y. at 40c.		$17,358 80	
"Difference in cost of 129 Split Switches, laid in track, and same number of common switches, as provided for in contract, 23		2,967 00	602
"40 Out-houses, at 40.00		1,600 00	
"Material for one Section House destroyed by fire while being stored in Niantic Station-house		273 22	
"For 75 rods Fence, built around Stone Quarry, between Randolph and Thornton, and around Harroldson's and Martin's land, at same place, at 70c.		52 50	
"For difference in cost of putting in 6 in. Pipe at Water Stations in place of 2 in. pipe, as called for in contract, as per Statement attached and marked "B 1"		4,709 18	603
"For furnishing material and erecting bridge at point one mile south of Ottumwa, where bank was washed out in February, 1887, as per statement attached, and marked "B 2"		841 34	

604	"For amount paid out by G. S. Good for borrow pits, &c., as per statement attached and marked "B 3".....	$4 50	
	"For extra work done on round house and turntable at Chillicothe, as per statement attached and marked "B 4".....	128 44	
	"For hauling stone for intake at Polo, Mo., beyond the one mile limit referred to in Art. 8, Sec. 2		
605	of Heman Clark contract.	64 00	
	"For increased weight of iron in J. T. Clark splices furnished, over the weight represented to contractor at the time the contract was entered into, as per statement attached and marked "B 5" as follows:		
	620,490 pounds at $1\frac{65}{100}$ cents....$10,238 08		
	"Freight paid on same..... 632 89		
606		10,870 97	
			$40,226 70
	"Forward.....		$3,890,453 93
	"Add net amount of miscellaneous credits and charges to Heman Clark, as per detailed statement attached and marked "C".....		5,344 86
			$3,895,798 79
	"Deduct previous estimates.....		3,867,734 01
	"Net amount of this estimate.....		28,064 78"

B. G. L.

"Correct:
"J. C. FORD.

"Approved:
"D. J. WHITTEMORE,
"Chief Engineer.

J. M. E.

"Approved:
"E. N. SEWALL,
Comptroller."

"Received of the Chicago, Milwaukee and St. Paul Railway Company twenty-eight thousand sixty-four and $\frac{78}{100}$ dollars in full for the above account.

Dated , 1888

Given, GEO. HOADLY, Referee.

TWENTY-SECOND.

On the ninth day of March, 1888, at the City of New York, a receipt or acknowledgment of which a copy is hereafter annexed, was sent by Mr. Frank S. Bond, the vice-president of the defendant Railway Company, to the plaintiff, Heman Clark, with the information that upon its signature by the said Clark and its return to him, the said bond, a check would be delivered to the said Clark for the sum of $173,532.49, therein mentioned; and thereupon the said plaintiff, Clark, signed and delivered the said receipt, declaration or acknowledgment, and had the same attested by one William C. Edwards, as a witness, and delivered the said receipt or acknowledgment to the said Frank S. Bond for the defendant Railway Company.

Given. GEO. HOADLEY, Referee.

TWENTY-THIRD.

The following is a copy of the said receipt, declaration or acknowledgment, so signed by the said Clark:

"WHEREAS, a final estimate has been made by D. J. Whittemore, Chief Engineer of the Chicago, Milwaukee and St. Paul Railway Company, of all the work done and material furnished under the contract made between said Railway Company and Heman Clark, bearing date March 6th, 1886, for the construction of the railroad from Ottumwa, in Iowa, to the Missouri River, including all extra work performed and material furnished of

610 every kind and description; which estimate with the prior monthly estimates, less deductions made for work not done and work assumed by said company, amounts to..... $3,905,798 79

" AND WHEREAS, the further sum of.. 34,598 90

should be credited to said Clark for materials sold by him to said company and certain rebates and other matters of that description, making, with the amount of said estimates, the sum of..... 3,930,397 69

" AND WHEREAS, the said Chicago, Milwaukee and St. Paul Railway

611 Company has paid the said Clark to apply on said contract, in money, material, labor and transportation, the sum of..... 3,626,865 20

" AND WHEREAS, by the terms of Section 4, Article 13, of said contract, said Clark was to be charged in addition for transportation the sum of..... ..... 50,000 00

" and by a supplemental contract was to allow the said Railway Company, by way of forfeiture in case said railway was not completed by the first day of June, 1887, the fur-

612 ther sum of..... ..... 40,000 00

" making the amount paid on said contract, together with the allowance of said transportation and the allowance of said forfeiture, the sum of..... 3,716,865 20

" leaving the amount still due said Clark on said contract the sum of.. 213,532 49

" AND WHEREAS, in and by said contract it was provided that the said Heman Clark, party of the first part, should save the said Railway Company free and harmless from all claims that might be made

against said Railway Company for liens of workmen and claims of sub-contractors, and from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle, and from all damages for cattle or other domestic animals killed or injured, and from all damages suffered by said sub-contractors and employees while engaged upon said work, of which said class of claims about $40,000 in amount have been made upon and are now pending in courts by divers claimants against said Railway Company, and the sum of $40,000 of the amount so due as aforesaid under said contract to the said Heman Clark has been reserved and set aside by said Railroad Company as indemnity or security for the payment of said claims and of such other claims of the same class as hereafter be made, in case said claimants or any of them recover judgments against said Railway Company, and the said $40,000, or the balance thereof, after paying and settling such claims as may be established against said Railway Company, is to be paid over to the said Heman Clark as soon as said claims are satisfied or said Railway Company suitably indemnified from any loss on account of the same; which---- $40,000 00
deducted from the sum of---------- 213,532 49
so as aforesaid due said Clark, leaves due and owing by said Railway Company and now payable on said contract to said Heman Clark, the sum of---------- 173,532 49

616 "Now, therefore, be it known, that I, the said Heman Clark, have received of and from the said Chicago, Milwaukee and St. Paul Railway Company the sum of one hundred and seventy-three thousand five hundred and thirty-two and $\frac{49}{100}$ dollars ($173,532.49) in full satisfaction of the amount due me on said estimates, and in full satisfaction of all claims and demands of every kind, name and nature, arising from, or growing out of, said contract of March 6th, 1886, and of the construction of said railroad, excepting the obligation of said Railway Company to account for said forty thousand dollars as hereinbefore provided."

"HEMAN CLARK."

617 "WM. C. EDWARDS."

Given. GEO. HOADLY, Referee.

TWENTY-FOURTH.

Upon and after the signing and execution by the said Heman Clark of the said declaration and acknowledgment last above mentioned, and the delivery thereof by him to the said defendant Railway Company, the said Company paid to the said Heman Clark, by its check dated at New York on the said 9th day of March, 1888, the sum of one hundred and seventy-three thousand five hundred and thirty-two and $\frac{49}{100}$ dollars ($173,532.49), which check was en-
618 dorsed by the said Heman Clark, and the amount thereof collected and received by him, and which sum has ever since been retained by him.

Given. GEO. HOADLY, Referee.

TWENTY-FIFTH.

The said Railway Company thereafter expended and paid out, for and on account of the said Heman Clark, the whole of the said sum of $40,000 mentioned and stated in the said declaration and acknowledgment or receipt as reserved and set aside by said Railway Company as indemnity or security for the

payment of the claims therein mentioned, and for 619
the purposes specified and provided for by said receipt and acknowledgment, or as authorized by the said plaintiff Clark, and it has also paid and laid out on account of said Clark, in addition to the said sum of $40,000 so reserved, the sum of $521.75, in addition to all other sums to which said Clark was or is entitled to credit.

Given. GEO. HOADLY, Referee.

TWENTY-SIXTH.

The said Railway Company did not require the plaintiff Heman Clark, to furnish any materials, or to do any work not required and agreed to be fur- 620
nished or performed by the said Clark in and by the terms or the provisions of the said contract or agreement of March 6, 1886; nor did it require him to furnish or erect any structure or structures of a more expensive design or plan than those called for by standard plans of the said Railway Company, which in said agreement and contract he agreed to furnish or erect, except or otherwise than as specified and set out in the statement annexed to the final certificate and estimate of the said D. J. Whittemore, Chief Engineer of the defendant Railway Company, as hereinabove stated; nor did the said plaintiff furnish any material, or do any work, not required of and agreed to be furnished or per- 621
formed by said Heman Clark in and by the said contract, or furnish or erect any structure or structures of a more expensive design or plan than called for by the standard plans of the said Railway Company, and agreed to be furnished and erected by the said Heman Clark, except or otherwise than as stated and allowed for in the said Chief Engineer's final estimate and certificate aforesaid.

Refused. Immaterial. GEO. HOADLY, Referee.

622 TWENTY-SEVENTH.

The plaintiff was not put to any loss, damage or expense in removing ties, rails or other track material or bridge timber or in the performance of the work under the said contract by reason of any failure of the defendant to procure the right of way as provided in said contract, either in the months of September and October, 1887, or at any other time.

Refused. Immaterial. GEO. HOADLY, Referee.

TWENTY-EIGHTH.

The defendant did not, prior to or at the time of the making of the said contract or agreement of March 6, 1886, falsely represent to the plaintiff that
623 the amount of solid rock required to be excavated under the said contract was 119,565 cubic yards, or any other amount; that there was no loose rock; that the amount of culvert timber was 3,874,316 feet, board measure; that there were 244,784 lineal feet of piling; that there were 1,824 lineal feet of Howe truss bridging; that there were 291,840 feet, B. M., of bridge ties, or any other specific quantity of either of the said articles or items, as being the entire amount of work of that class to be done in the completion of the said contract.

Refused. Immaterial. GEO. HOADLY, Referee.

TWENTY-NINTH.

624 The defendant did not, while the plaintiff was engaged in the performance of his work under said contract of March 6, 1886, wrongfully, negligently or unskilfully give to the plaintiff wrong grades or lines under which to build the embankment and grade the roadbed of the said railroad, whereby the plaintiff was compelled to furnish to the defendant embankment or piling in excess of that required and called for in the contract to the amount of 385,000 cubic yards, or any other amount.

Refused. Immaterial. GEO. HOADLY, Referee.

THIRTIETH.

In and by the First Article of the said contract or agreement of March 6, 1886, the plaintiff agreed

> "To furnish all the material for, and also to execute, construct and finish in every respect in the most substantial and workmanlike manner, all the work thereinafter specified and required by the said first party (*i. e.*, the Railroad Company), to be done in the construction and completion of the said first party's line of railroad from the City of Ottumwa, Iowa, to Harlem Station, Missouri, a total distance of 202.8 miles."

And also agreed that

> "All the materials and workmanship required to be furnished or performed for, in or about the work hereinabove mentioned and hereinafter particularly specified and set forth shall be furnished and performed in strict accordance with the rules, regulations and specifications therefor, now made or hereafter to be made by said Chief Engineer, and in all respects to his satisfaction and acceptance."

The plaintiff also agreed to furnish and lay in place all the track material required by the Railway Company for 202.8 miles of main and side tracks, including in said track material so by him to be furnished and laid in place, steel rails of sixty pounds per yard, splices and bolts of the J. T. Clark pattern, spikes and ties. All of said material to be of the said Railway Company's standards and sizes, and which materials he agreed to purchase from the Railway Company at prices specified in the said contract, and which the Railway Company agreed to sell to him at such prices.

By the said contract the plaintiff also agreed to fully spike all the main and side tracks to be laid by him; to place and well bolt the splices therefor, and to do all the work of laying said tracks in the most approved manner, and to the satisfaction and

628 acceptance of the Chief Engineer of the Railway Company.

Refused as immaterial. GEO. HOADLY, Referee.

THIRTY-FIRST.

During the progress of the said work, the defendant Railway Company furnished and delivered to the plaintiff, for use upon and in the construction of the said railroad, and in laying the tracks thereon, and as part of the track material, certain articles known as nut-locks, which are used upon and in connection with the bolts and nuts upon the splices, for the purpose of locking and holding in
629 place the nuts upon the said bolts and splices.

Given. GEO. HOADLY, Referee.

THIRTY-SECOND.

Such nut-locks are a necessary part of the track material required for the construction and finishing in the most substantial and workmanlike manner, of the work necessary to be done in the construction and completion of a line of railroad.

Refused. GEO. HOADLY, Referee.

THIRTY-THIRD.

Such nut-locks are necessary to be used to place
630 and well bolt the splices upon the rails agreed to be laid, and to do the work of laying said tracks in the most approved manner.

Refused. GEO. HOADLY, Referee.

THIRTY-FOURTH.

In the construction of the lines of railroad of the defendant Railway Company then in existence, nut-locks, had been used to a large extent, and they were a standard of the said Chicago, Milwaukee and St. Paul Railway Company, and were then in gen-

eral use upon other lines of railroad throughout the United States. 631

Refused because of the description as "stardard." GEO. HOADLY, Referee.

THIRTY-FIFTH.

The defendant Railway Company did not fail to procure the necessary right of way for the construction of the railroad agreed to be built by the plaintiff under the said contract of March 6, 1886, at or near Minnaville, Missouri, at the crossing of the Hannibal & St. Joseph Railroad, in such time as not to delay the plaintiff in the completion of the work of construction of the said railroad at the said crossing. 632

Refused. GEO. HOADLY, Referee.

THIRTY-SIXTH.

The right of way for the line of railroad of the defendant Railway Company at Minnaville was procured by the defendant Railway Company in July, 1886, and the point and place and method of crossing of the railroad of the defendant Railway Company with the railroad of the Hannibal and St. Joseph Railroad at the said place was arranged for and completed by and at the time that the plaintiff was ready to lay the track at that place upon the line of the defendant's railroad agreed to be built under and by the said contract of March 6, 1886. 633

Refused. GEO. HOADLY, Referee.

THIRTY-SEVENTH.

The defendant Railway Company did not, in the month of June, 1888, or at any other time, without the knowledge or consent of the plaintiff, wrongfully or otherwise take possession of any timber belonging to the plaintiff, or convert the same to its own use for the purposes of repairing a wash-out or otherwise.

Refused. GEO. HOADLY, Referee.

634 AS CONCLUSIONS OF LAW.

FIRST.

The receipt, declaration and acknowledgment signed and executed by the plaintiff Clark on the 9th day of March, 1888, hereinbefore mentioned and set out, and the statement therein contained and recited, of the amount earned by and paid to the said Clark by the defendant Railway Company, was and is an amount stated and agreed to by and between the said plaintiff Clark and the defendant Railway Company concerning the amount and value of the work done and material furnished by the
635 said plaintiff under the said contract made between the said Heman Clark and the said defendant Railway Company, dated March 6, 1886, for the construction of the railroad thereby agreed to be built by the plaintiff, including all extra work performed and materials furnished by him of every kind and description, and of the credits to which the plaintiff was entitled for materials sold by him to said Railway Company, and rebates and other matters of that description; and of the amount which the said Railway Company had paid to the said Heman Clark to apply on the said contract, in money, material, labor and transportation, and of the amount with which he was chargeable for trans-
636 portation under the said contract, and the amount with which he was also chargeable by reason of the supplemental contract or agreement, for not completing the said railroad by the first day of June, 1887, whereby it was stated and agreed that the amount then due to the said Heman Clark on the said contract was the sum of $213,532.49, and whereby it was further agreed that $40,000 of the amount so due under said contract by said Railway Company to said plaintiff Clark should be reserved and set aside by said Railway Company as an indemnity or security to it for the payment of claims against said Heman Clark or

against said Railway Company for liens of workmen and claims of sub-contractors of said Clark, and from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle, and from all damages for cattle and other domestic animals killed or injured, and from all damages suffered by sub-contractors and employees while engaged upon said work, from and against which the said Clark had agreed to save the said Railway Company free and harmless, and that there was then payable on said contract to said Clark by said Railway Company the sum of $173,532.49. 637

Refused. GEO. HOADLY, Referee.

SECOND. 638

In and by the payment of the said sum of $173,532.49, made by said defendant Railway Company to said Heman Clark on said 9th day of March, 1888, upon the execution and delivery by him to the said Railway Company of the said receipt, declaration and acknowledgment hereinbefore mentioned, whereby the said plaintiff acknowledged that he had received from the said defendant Railway Company the said sum of $173,532.49 in full satisfaction of the amount due to him on the estimates of the Chief Engineer of said Railway Company therein referred to, and in full satisfaction of all claims and demands of every kind, name and nature, arising from or growing out of the said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of the said Railway Company to account for the said sum of $40,000 reserved as aforesaid to meet claims, there was an accord and satisfaction between the said plaintiff and the said defendant Railway Company as to the amount due by said Railway Company to the plaintiff upon the estimates of the Chief Engineer of said Railway Company, and of the amount and value of all work done and material furnished by said Clark under said contract between said Clark and said Railway Company for the construction of said railroad agreed 639

640 to be built by the plaintiff as aforesaid, including all extra work performed and material furnished of every kind and description, and the payment by said Railway Company to said Clark of said sum of $173,-532.49 in full satisfaction of the amount due to him from said Railway Company upon said estimates of the Chief Engineer of the Railway Company, and for all claims and demands of every kind, name and nature in favor of said plaintiff Clark against the said defendant Railway Company, arising from or growing out of said contract of March 6, 1886, and of the construction of the said railroad before referred to, except the obligation of said Railway Company to account for the sum of $40,000 re-
641 served by said Railway Company as an indemnity against claims which might be made against said Company for liens of workmen and claims of subcontractors and other claims for damages as specified in said receipt or acknowledgment.

Refused. GEO. HOADLY, Referee.

THIRD.

The defendant Railway Company has duly accounted for the expenditure of the said sum of $40,-000 so reserved as aforesaid to meet, or as an indemnity against, claims which were made against said Company for liens of workmen and claims of subcontractors, and other claims for damages paid by
642 the defendant Railway Company, and for the expenditure of $521.75 in addition thereto, which sum the defendant Railway Company is entitled to recover from the plaintiff, with interest.

Given. GEO. HOADLY, Referee.

FOURTH.

The plaintiff is not entitled to recover of or from the defendant Railway Company for any extra work alleged to have been performed or materials furnished in the construction of the said line of railroad for the defendant Railway Company, from Ot-

tumwa, Iowa, to the Missouri River, under the contract of March 6, 1886, made between the said Heman Clark and the said Railway Company, or for the erection of any structures more in number or of a more expensive design than called for in the plans and specifications under the said contract, as alleged in the plaintiff's complaint, except or otherwise than as stated and contained and allowed for in the final certificate and estimate of the said D. J. Whittemore, Chief Engineer of the said defendant Railway Company, hereinbefore mentioned.

Given, although immaterial. GEO. HOADLY, Referee.

FIFTH.

The plaintiff is not entitled to recover of or from the defendant the sum of $2,196, or any other sum for any alleged loss, damage or expense incurred by the plaintiff in removing ties, rails or other track material in September or October, 1887, or in the performance of any of the work required to be done under the said contract between the plaintiff and the defendant Railway Company in the construction of the said road by reason of any alleged failure on the part of the defendant to procure any right of way necessary for the construction of the said railroad in the months of September and October, 1887, or at any other time.

Given. GEO. HOADLY, Referee.

SIXTH.

The plaintiff is not entitled to recover of or from the defendant the sum of $2,425, or any other sum, for or on account of any timber belonging to the plaintiff, alleged to have been converted by the defendant Railway Company to its own use in the month of June, 1888, or at any other time.

Refused. GEO. HOADLY, Referee.

646 SEVENTH.

In and by the said receipt and acknowledgment signed and executed by said Heman Clark on the 9th day of March, 1888, the said plaintiff Clark agreed to accept the said sum of $173,532.49 therein mentioned, and then paid to him by the defendant Railway Company, in full satisfaction of the amount due to him by said Railway Company on the estimates of the Chief Engineer of the Railway Company, and in full satisfaction of all claims and demands of said Clark against said Railway Company of every kind, name and nature, arising from and growing out of said contract of March 6, 1886, and of the construction of said railroad thereby agreed
647 to be built, except the obligation of said Railway Company to account for said sum of $40,000 reserved to meet claims as provided in said instrument.

Refused. GEO. HOADLY, Referee.

EIGHTH.

The said sum of $173,532.49 then paid by said Railway Company to said plaintiff Clark, and received and collected by him, was a good and valuable consideration for the execution and delivery of said instrument by him and for said agreement by said Clark.

Refused. GEO. HOADLY, Referee.

648

NINTH.

In and by the said receipt and acknowledgment signed by said plaintiff, the said Clark, as far as he could legally bind himself for the consideration recited in said paper, accepted the said sum of $173,532.49 as in full, as therein stated, except as to the sum of $40,000 reserved to meet his guaranty recited in said receipt; and as far as his agreement and signature could give it force, agreed and accepted these amounts as establishing that he had no claim for nut-locks and had credited the Railway

Company with $40,000 because of the non-completion of the railway by the first of June, 1887. 649

Not a conclusion of law. Refused. GEO. HOADLY, Referee.

TENTH.

It is of no value or importance in this consideration, that the plaintiff Clark claims to have signed the said receipt improvidently and without due consideration. He is bound by it so far as he could legally bind himself from retraction, quite as much as if he had taken days for its consideration, been advised by counsel, and was under no pecuniary stress pressing him to accept a smaller sum than was due. 650

Argument and not conclusion of law. Refused. GEO. HOADLY, Referee.

ELEVENTH.

The agreement made by said plaintiff Clark with said Railway Company to forfeit the sum of $40,000 if said railroad agreed to be built was not completed by the first day of June, 1887, was supported by a valuable consideration, and was intended to be, and was, in its essential nature, liquidated damages.

Argument and not a conclusion of law. GEO. HOADLY, Referee.

TWELFTH. 651

The said receipt and acknowledgment of March 9, 1888, executed by said Heman Clark as aforesaid, in consideration of the said sum of $173,532.49 then paid to him by the defendant Railway Company, and the acceptance by said Clark of the payment of said sum to him by said Railway Company, and its retention by him was, and is a bar to the recovery by the plaintiff in this action, of the amount charged to the plaintiff by the defendant Railway Company for nut-locks; and of the amount of the said forfeiture

652 of $40,000 for not finishing the said railroad agreed to be built by the first day of June, 1887.

Refused. GEO. HOADLY, Referee.

THIRTEENTH.

The plaintiff cannot maintain this action upon the complaint, or the amended complaint, therein, for the recovery by him from the defendant of the amount charged to him for nut-locks, used by him in the construction of the railroad agreed to be built by him, as provided by said contract of March 6, 1886, between the plaintiff and the defendant Railway Company; or for the recovery of the amount of the forfeiture of $40,000 agreed to by the said plain-
653 tiff if the said railroad so agreed to be built was not completed by the first day of June, 1887.

Refused. GEO. HOADLY, Referee.

FOURTEENTH.

The plaintiff is not entitled to recover from the defendant Railway Company the amount charged to him for nut-locks used in the construction of said railroad agreed to be built by him as provided by said contract of March 6, 1886.

Refused. GEO. HOADLY, Referee.

FIFTEENTH.

654 The plaintiff is not entitled to recover from the defendant Railway Company in this action the amount of said forfeiture of $40,000 for not completing said road so agreed to be built by the first day of June, 1887.

Refused. GEO. HOADLY, Referee.

SIXTEENTH.

There is no proof that the defendant Railway Company wrongfully took possession of, or converted to its own use, any timber belonging to the

plaintiff, without his knowledge or consent, in the month of June, 1888, or at any other time.

Refused. GEO. HOADLY, Referee.

SEVENTEENTH.

The plaintiff is not entitled to, and cannot maintain, his action for the recovery of the value of any timber alleged to have been taken by the defendant Railway Company and converted to its own use, without the knowledge and consent of the plaintiff; for the reason that the cause of action for such alleged taking and conversion which is in tort, cannot be united with the other causes of action stated in the complaint, which are upon contract.

Refused. GEO. HOADLY, Referee.

EIGHTEENTH.

The plaintiff is not entitled to recover of the defendant the sum of $2,425, or any other sum, as or for the value of any timber alleged to have been taken and converted by the defendant to its own use in the month of June, 1888, or at any other time.

Refused. GEO. HOADLY, Referee.

NINETEENTH.

The defendant Railway Company has duly expended, and has accounted to the plaintiff for the expenditure of the said sum of $40,000 reserved to meet claims against which the plaintiff agreed to indemnify the defendant as provided in and by said receipt and acknowledgment; and has also paid out and expended the sum of $521 $\frac{75}{100}$ in addition thereto.

Given. GEO. HOADLY, Referee.

TWENTIETH.

The plaintiff is not entitled to recover of or from the defendant Railway Company any sum whatever for, upon or by reason of any of the matters or

658 things alleged in the complaint in this action, or in the amendments to the complaint, or the amended complaint.

Refused. GEO. HOADLY, Referee.

TWENTY-FIRST.

The defendant Railway Company is entitled to recover of and from the plaintiff, Heman Clark the sum of five hundred and twenty-one $\frac{75}{100}$ dollars ($521.75) with interest thereon, amounting in all to the sum of eight hundred and twenty-six $\frac{53}{100}$ dollars ($826.53); and is entitled to judgment therefor against the plaintiff, together with its costs and disbursements of this action.

659 This would be correct but for the provision as to costs and disbursements, as it is, it is refused. GEO. HOADLY, Referee.

(Endorsed)—Report of George Hoadly, Referee.—Circuit Court of U. S. 2d Circuit & Southern Dist. of N. Y.—Heman Clark *vs.* Chicago, Milwaukee & St. Paul Railway Company.—U. S. Circuit Court.—Filed Feb. 18, 1898.—John A. Shields, Clerk.

(NOTE.)

660 "The exceptions filed by the defendant to the report, findings, decision and conclusion of law of the Hon. Geo. Hoadly, the Referee in this action, filed February 18, 1898, and which exceptions were filed with the Clerk of the Circuit Court of the United States for the Southern District of New York, on the 14th day of February, 1898, and are included as part of the judgment roll, are set out in the bill of exceptions. at pages 619-657 of the original transcript of record (p. 447 of the same as printed)."

See stipulation of counsel at end of record.

UNITED STATES CIRCUIT COURT, 661

SOUTHERN DISTRICT OF NEW YORK.

HEMAN CLARK vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.	Judgment.

This cause coming on for trial and to be heard at 662
a regular term of the Circuit Court of the United States for the Southern District of New York, held at the United States Court House, in the City of New York, before the Honorable Addison Brown, District Judge, without a jury, and a trial by jury having been expressly waived by the written consent of the parties duly filed with the Clerk of the Court, by which consent also it was provided and agreed that the Hon. William G. Choate should be appointed Referee to hear and determine the said action and the issues therein; and afterwards, to wit, upon the 19th day of October, 1894, an order having been made by this Court referring the said action to the Hon. William G. Choate, as Referee, to 663
hear and determine the same and the issues therein, and the said William G. Choate having declined to serve as such Referee; and subsequently, to wit, upon the 3d day of January, 1895, an order having been made upon the written consent of the attorneys for the plaintiff and the defendant respectively, appointing the Hon. George Hoadly as Referee to hear and determine the said action and the issues therein.

And the parties having appeared before the said Hon. George Hoadly, as Referee, and having submitted their proofs, and the said George Hoadly, as

664 Referee, having made his report and decision in the said action and upon all the issues therein, which report was filed in the office of the Clerk of this Court on the 14th day of December, 1897; and subsequently, upon the 3d day of February, 1898, this Court, by order in this cause, having recommitted such report to the said Referee to separately state his findings of fact and conclusions of law, and the said George Hoadly, as such Referee, having under and pursuant to such last mentioned order made his further report, stating separately his findings of fact and conclusions of law, which report was filed in the office of the Clerk of this Court on the 18th day of February, 1898.

665 And the defendant having duly and seasonably made and filed its several exceptions to each and every of the said reports, and to the several findings, decisions and conclusions of the said Referee, as therein contained, and also to each and every of the several refusals of the Referee to find and decide in accordance with the several requests of the defendant, and each and every of such requests, refusals and exceptions having been duly filed in the office of the Clerk of this Court; and the said Receiver having made, settled and allowed a certain case and bill of exceptions in this cause, which were filed with the Clerk of this Court on or about the 25th day of March, 1898;

666 And thereupon the plaintiff having moved and applied for judgment upon and in accordance with the said reports of the said Referee, notwithstanding the said several exceptions filed by the defendant, and the said case and bill of exceptions; and at the same time and place the defendant having moved to set aside each and every of the said reports of the said Referee and for judgment thereon for the defendant, on the several grounds—(1) that the findings of fact made by the said Referee, as contained in his said report made and filed herein on the 18th day of February, 1898, do not authorize said judgment for the plaintiff; (2) that the Referee's conclusions of

law, as set forth in said Referee's report numbered 667
1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, respectively, are not, nor is any of them, sustained by any finding of fact set forth in said report; (3) that the Referee's conclusions of law are erroneous; (4) that the Referee's finding of fact as to the first cause of action entitle the defendant to judgment dismissing the complaint as to that cause of action; and (5) that the Referee's findings of fact as to the cause of action for lumber alleged to have been used by the defendant in June, 1888, are not sustained by the evidence, and that there is no evidence to support the said findings of fact;

And the counsel for the defendant also having requested the Court to find as matters of fact, and 668
to decide as conlusions of law, each and every of the several statements of fact and the several propositions of law stated in the said several requests to find and to decide submitted by the defendant to the said Referee, annexed to and made part of the said report of the said Referee filed herein on the 18th day of February, 1898;

And thereupon the Court having refused to make or to give any or either of the several findings of fact and the several conclusions of law, which, as stated in his said report, were refused by the said Referee, and having adopted, allowed and given or made each and every such findings of fact and conclusions of law as the same had been so made and 669
allowed or given by the said Referee;

And having heard the counsel for the respective parties, and due deliberation thereon having been had,

It is ordered and determined, that each and every of the several exceptions taken and filed by the defendant to the said reports of the said Referee, and to each of them, and to each and every of the several findings of fact and conclusions of law made by the said Referee as contained in his said report or reports, and each and every of the several exceptions taken and filed by

670 the defendant to the several refusals of the Referee to find and decide as severally requested by the defendant, as to which findings, conclusions and refusals the defendant has made and filed exceptions as aforesaid, be and hereby the same are and each of them is overruled, and each and every of the several rulings and decisions of the said Referee in and upon the trial of this action as contained and appearing in the said case and bill of exceptions and the said decision and decisions, findings and conclusions of law of the said Referee, as stated and contained in the said reports, be and hereby each of them is, made the ruling, decision, finding of fact and conclusion of law of the Court in this action.

671 And further it is ordered that the defendant's motion for judgment in favor of the defendant upon the said report of the said Referee, and to set aside the report of the said Referee, and for a judgment dismissing the complaint in the action, be and hereby the same is denied, to which denial the defendant duly excepts.

And upon motion of Messrs. Kellogg, Rose & Smith, attorneys for the plaintiff, the defendant appearing and opposing,

It is further ordered and adjudged, that the plaintiff do recover of the defendant the sum of $80,-479.35, with lawful interest thereon to be computed
672 from the 4th day of December, 1897, together with the costs and disbursements of this action, to be taxed.

And thereupon the defendant having moved for an arrest of judgment in this action on the ground,

(1.) That the plaintiff is not entitled to judgment in this action upon the complaint therein as to the first cause of action, upon the facts found or findings of fact made by the Referee or by the Court, as stated in the said report of the said Referee, hereinbefore made the findings and decisions of the Court; and on the further ground

(2.) As to the said first cause of action, that the right of the plaintiff to recover the two sums of $9,558.63 and $40,000 mentioned in said Referee's findings and report, with interest, was and is barred by the receipt or acknowledgment and instrument executed and delivered by the plaintiff, Heman Clark, to the defendant, on the 9th day of March, 1888, whereby the said plaintiff acknowledged that the sum of $173,532.40, then paid to him by the defendant Railway Company, was in full satisfaction of the amount due to him on the estimates of the Chief Engineer of the defendant Railway Company, and in full satisfaction of all claims and demands of every kind, name and nature, arising from or growing out of the said contract of March 6, 1886, and the construction of said railroad, except the obligation of the said Railway Company to account for a certain sum of $40,000 therein mentioned, which sum of $40,000 as stated in the said Referee's findings and report, has been fully and duly accounted for by the defendant; and on the further ground

(3.) That the plaintiff is not entitled to judgment upon the complaint herein as to the first cause of action, inasmuch as the award of said judgment to the plaintiff constitutes a judgment or recovery for equitable relief in an action at law; and upon the further ground

(4.) That the plaintiff is not entitled to judgment upon the complaint herein, as to the second cause of action, for the recovery of the value of certain lumber belonging to the plaintiff, alleged to have been taken and converted by the defendant to its own use in June, 1888, for the reason that the cause of action therefor is one which could not be united with the other causes of action stated in the original complaint.

It is thereupon ordered and adjudged, that the said motion, and each and every part of said motion,

676 of the defendant be and hereby the same is denied, to which denial the defendant duly excepts.

Dated April 6, 1898.

ADDISON BROWN.

Form of foregoing judgment approved.
BANGS, STETSON, TRACY & MACVEAGH,
Defendant's Attorneys.

We hereby approve the form of the above proposed judgment and consent to the entry thereof.

New York, April 4, 1898.

KELLOGG, ROSE & SMITH,
677 Attorneys for Plaintiff.

(Endorsed)—U. S. Circuit Court, Southern District of New York.—Heman Clark *vs.* Chicago, Milwaukee & St. Paul Railway Company.—Judgment.—U. S. Circuit Court.—Filed Apr. 6, 1898. —John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

678 HEMAN CLARK

AGAINST

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Defendant's exceptions to judgment and decision of the Court, &c.

The defendant excepts to the refusal of the Court to make or to give in or by the judgment or order for judgment made and filed herein on the sixth day of April, 1898, any or either of the several findings of fact or any or either of the several conclusions of

law which, as stated in the report of the Referee filed herein on the 18th day of February, 1898, and in the case and bill of exceptions filed herein on the 25th day of March, 1898, were refused by the said Referee.

And the said defendant also excepts to the adoption and allowance by the Court of every such finding of fact and conclusion of law as was made and given by the said Referee as contained in his said report filed as aforesaid, to which the defendant has heretofore made and filed exceptions as stated in its said exceptions filed to the said report as aforesaid, and as stated in the case and bill of exceptions filed as aforesaid.

The said defendant Railway Company also excepts to the order made by this Court upon the hearing herein upon the report of the said Referee, whereby the Court overruled each and every of the said exceptions taken and filed by the defendant to the report of the Referee filed herein on the 14th day of December, 1897, and which also overruled the exceptions filed herein by the defendant to the report of the said Referee, filed herein on the 18th day of February, 1898; and which overruled the exceptions of the defendant to each and every of the several findings of fact and conclusions of law made by the said Referee as contained in his said report or reports, so far as the same were excepted to by the defendant in and by the said exceptions taken and filed by said defendant to the said reports, as aforesaid; and the defendant also excepts to so much of the order of this Court made herein as overruled the exceptions taken by the defendant to the several refusals of the Referee to find and decide as requested by the defendant, as to which findings, conclusions and refusals to find and decide the defendant made and filed exceptions as aforesaid.

And the defendant also excepts to each and every of the several rulings and decisions of the Court which adopted and made the rulings and decisions

682 of the Referee upon the trial of the action as stated in the case and bill of exceptions settled and allowed by the Referee and filed herein on the 25th day of March, 1898, the decisions and rulings of the Court, so far as the defendant had excepted to such rulings, decisions and conclusions as stated in the said case and bill of exceptions filed herein as aforesaid.

The defendant also excepts to the order of this Court denying defendant's motion for judgment in favor of the defendant upon the report of the said Referee, and also to its denial of the motion to set aside the report of the said Referee and for judgment dismissing the complaint in this action.

The defendant also excepts to the order of the
683 Court denying the motion of the defendant for an arrest of judgment in this action upon the grounds stated in said order.

Dated April 6, 1898.

BANGS, STETSON, TRACY & MAC VEAGH,
Defendant's Attorneys.

(Endorsed)—Circuit Court of the United States, Southern Dist. N. Y.—Heman Clark against Chicago, Wilwaukee & St. Paul Railway Company.—Defendant's Exceptions to Judgment & Decision of the Court, &c.—Bangs, Stetson, Tracy & Mac Veagh, Attorneys for Defendant, 15 Broad Street, New York.—U. S. Circuit
684 Court.—Filed Apr. 6, 1898.—John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HEMAN CLARK

AGAINST

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

The issues in this action having been referred by the consent of the parties to Hon. George Hoadly, as Referee, to hear and determine the same, and the said Referee having duly made and filed his report, wherein and whereby he finds that the plaintiff is entitled to judgment against the defendant for the sum of $80,479.35, with interest thereon from the 4th day of December, 1897, the date of the said report, with costs, and the defendant having filed exceptions thereto, and the said exceptions having been overruled and the judgment of the said Referee confirmed and made the judgment of this Court, and the plaintiff's costs having been duly taxed on notice at the sum of $5,969.13;

Now, on motion of Kellogg, Rose & Smith, attorneys for the plaintiff.

It is adjudged that the plaintiff, Heman Clark, recover of the defendant, Chicago, Milwaukee and St. Paul Railway Company, the sum of $80,479.35, the amount found due to him from the defendant, together with interest thereon from the 4th day of December, 1897, amounting to $1,636.38, amounting together to the sum of $82,-115.73, with his costs as taxed by the Clerk, amounting to $5,969.13, and which amount together to the

688 sum of $88,084.86, and that the said plaintiff have execution against the said defendant therefor.

Judgment signed this sixth day of April, A. D. 1898.

JOHN A. SHIELDS,
Clerk.

(Endorsed)—U. S. Circuit Court, Southern District of N. Y.—Heman Clark against The Chicago, Milwaukee and St. Paul R. R. Co.—Judgment, Kellogg, Rose & Smith, Attys. for Plff., 120 Broadway, New York.—U. S. Circuit Court.—Filed Apr. 6, 1898, 11.29 A. M.—John A. Shields, Clerk.

689 ———

IN THE CIRCUIT COURT OF THE UNITED STATES,

IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

HEMAN CLARK,
Plaintiff,

vs.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
690 Defendant.

DEFENDANT'S CASE AND BILL OF EXCEPTIONS ON TRIAL BEFORE REFEREE.

Be it remembered that this action was commenced on the 17th day of August, 1893, in the Supreme Court of the State of New York, in the City and County of New York.

The defendant duly appeared in the action by its attorneys, and thereupon the cause was duly removed upon the petition of the defendant to the Cir-

cuit Court of the United States for the Southern Dis- 691
trict of New York.

The defendant thereupon duly answered the complaint of the plaintiff in the Circuit Court of the United States; and during the trial of the cause as hereinafter stated, the plaintiff made, by leave of the Court or Referee, certain amendments to the complaint in the nature of additional causes of action as hereinafter stated; and afterwards the defendant served an amended answer to the said original complaint by leave of the Court or Referee before whom the cause was tried, and also an answer to the plaintiff's amendments to the original complaint, as hereinafter stated.

The plaintiff's attorneys also served upon the de- 692
fendant's attorneys a bill of particulars of plaintiff's claim in this action of which the following is a copy:

(Insert Bill of Particulars.)

The plaintiff also served a reply to the defendant's answer to the original complaint.

(The pleadings appear in the Judment Roll and are not here inserted, *pro ut recordum.*)

By consent in writing of the attorneys for both parties an order was made in the action on the third day of January, 1895, whereby Hon. George Hoadly 693
was appointed Referee in the action in place of Hon. William G. Choate, who had previously been appointed Referee by written consent of the parties and had resigned; and the action and all the issues therein, were referred to the said George Hoadly as sole Referee to hear and determine the same.

Afterwards the issues in the said action came on to be tried before the said George Hoadly as such Referee on the 21st of March, 1895, and such trial and hearing was continued from time to time before said Referee until the 28th of November, 1896, when the taking of testimony was closed on both sides; and

694 the case was thereafter argued by counsel for the plaintiff and defendant respectively, and submitted upon briefs as hereinafter stated.

This case and bill of exceptions contains a statement of all the testimony produced by either party which is material to the matters or questions decided by the Referee against the defendant.

Mr. Bangs read the answer and stated that the proposed amendment is merely setting up another provision of the contract. The amendment is allowed with the privilege to plaintiff to amend as he may be advised, before the opening of defendant's case, to which counsel for defendant agrees.

695 The plaintiff, to sustain the issues on his part, offered in evidence the contract dated March 6, 1886, between the defendant, The Chicago, Milwaukee & St. Paul Railway Co., of the first part, and the plaintiff, Heman Clark, of the second part, which was admitted in evidence, of which a copy is set out and made part of the Referee's findings, contained in his report filed, and which is part of the judgment roll (*prout* the same).

The plaintiff also offered in evidence a contract dated July 12, 1887, made between the plaintiff and defendant Railway Company, which was signed and executed on behalf of the plaintiff by W. W. Hegeman, and by or for the Railway Company by
696 Roswell Miller, general manager, which recited the making of the contract of March 6, 1886, and that the work thereunder was in process of construction and completion, and was uncompleted, and whereby it was agreed that the Railway Company would perform all the labor and do all the work necessary to surface, ditch, raise and widen the banks of said railroad from the Des Moines River Bridge, at Ottumwa, to such point as the track should have been continuously surfaced at that time near Newtown, Missouri, a distance of about seventy-seven miles from Ottumwa, including the widening of Fisher Cut required

by the contract of March 6, 1886, and also that the 697
Railway Company would perform all the labor and do all the work necessary to surface the track, do all ditching, widening and raising of banks from the point last mentioned to the southerly end of the track as then laid in the vicinity of Cowgill, about seventy-one miles from Newtown, and that it would perform all the labor and do all the work necessary to surface the track and do all ditching required from the said point at or near Cowgill to the Missouri River.

And the plaintiff Clark agreed to pay to the railway Company for all the work performed for that portion of the road between or from the Des Moines River Bridge in Ottumwa, to Newtown, the sum of 698
$100 per mile of main track, and for the work specified from the point near Newtown to the Missouri River at the rate of $250 per mile of main and side tracks, such payments to be made by deduction from the amount due or to become due to the plaintiff from the Railway Company, under and in pursuance of the contract of March 6, 1886, the plaintiff Clark to do as required by said contract of March 6, 1886, the surfacing and filling of the yard at Ottumwa, and of the main track between the point where it leaves the Marion and Ottumwa line to the Des Moines River Bridge, and it was further agreed that the said agreement was not intended to and did not relieve the plaintiff Clark from any liability or 699
responsibility for any injury theretofore done to the rails on said track, or that might thereafter arise on that portion of the track described in the said division between Newtown and Cowgill prior to the time when the same should be turned over to the Railway Company, nor should it relieve the said Clark from fully performing and carrying out to completion the said contract of March 6, 1886, in all respects, except as to the work specified and to be performed by the Railway Company, and except that the Railway Company should have possession of said track and be at liberty to use the same for traffic purposes so

700 far as it could be used without injury to the work of construction.

Plaintiff's counsel called WILLIAM W. HEGEMAN on behalf of plaintiff, who testified as follows:

I reside in New York City; my business or profession is that of a Civil Engineer and Contractor. I have been engaged in the work of engineering and contracting more than twenty years. I was employed by Heman Clark, as engineer, and had charge of the construction of the work under this contract of March 6, 1886, between Clark and the Chicago, Milwaukee and St. Paul Ry. Co. from Ottumwa,
701 Iowa, to the Missouri River. I was on the line of the entire work. I had entire charge of the construction of it for Mr. Clark. The work was begun on the so-called northeastern end, commencing at Ottumwa, Iowa, in the spring of 1886; we immediately went on with the work after the execution of the contract. Went there in the latter part of March. We received notice from the Company to begin work in the latter part of March, and we went to work immediately after we received the notice. My recollection is that we began in the following April, the contract being dated the 6th of March, 1886. The Chief Engineer of the Chicago, Milwaukee and St. Paul Railroad Company was D. J. Whit-
702 temore. Mr. F. W. Kimball was at that time the Assistant Chief Engineer, and there were several division engineers. There were two hundred miles divided into three divisions. We commenced work on Division A. We moved a very large force on Division A, and followed it by attacking the heavy points on Division C. In August we had three thousand teams and possibly three to four thousand men all told. It was designed to push the work from the northeastern end and continuously and with that in view large forces were put on and the heavy points attacked. The work was driven so the track began, I think, in August, 1886, and generally the work

was carried along together so as near as possible to make continuous track laying. The track laying began at Ottumwa. The track was laid by us under the contract. We made the connection early in November, 1887, with the bridge across the Missouri River, so that the line was open continuously for train service in November, 1887. This bridge was about six miles down the river from Kansas City. We did the whole of this work under the direction of the Chief Engineer of the Railway Company and his assistants. I followed their directions in every bit of the work, and it was done exactly as they directed and in accordance with their directions throughout the entire work. It began in March, 1886, and we quit in the latter part of February, 1888; but we had the line open so that trains were in service in November, 1887. We were delayed during the progress of the work. We were not provided with rights of way, nor right of way at the crossing of the Hannibal and St. Joseph Railroad near Minnaville.

We were not provided with right of way at several points, notably between Lawson, Missouri, and the Fishing River, and at the proposed crossing of the Hannibal and St. Jo. Road. We were delayed at Gault, Missouri, because the question of division terminals was not decided so that work could be commenced there until the fall of 1886. We were delayed through the mistakes in plans furnished for a bridge which had to be taken down and reframed and re-erected. The engineers made the mistake. The plans were furnished by the Company. The bridge was near Lawson, north of Lawson, Missouri. There were delays in furnishing transportation for men and materials; there were delays occasioned by failure to furnish engines to do switching; there were delays in furnishing engines for switching at the yards at Ottumwa, keeping men idle at many times.

Q. (Press copybook shown witness.) Is that the letter that you wrote on June 3, 1886? A. It is a press copy of it, signed by me, addressed to F. W.

706 Kimball, Manager of Construction, and was written at Ottumwa.

Letter offered in evidence.

Received and marked **Plaintiff's Exhibit No. 3**, and read in evidence as follows:

"OTTUMWA, IOWA, June 3, 1886.

F. W. KIMBALL,
Manager Construction.

Dear Sir:

Will you kindly provide right of way for the line near Liberty. It is desirable to open the heavy cuts in the third division at once. At 1068 and at other
707 points, I am advised it is impossible to do this on account of delay in rights of way matters.

Respectfully yours,
W. W. HEGEMAN."

I afterwards saw Mr. Kimball and went over the line with him and spoke to him about these rights of way and shortages in rights of way, and points where right of way had not been provided.

On July 26, 1886, I wrote this letter to Mr. Kimball, as manager of construction. It was sent to him by mail.

The letter was offered and received in evidence and marked **Plaintiff's Exhibit No. 4**, and
708 was read in evidence as follows:

JULY 26th, 1886.

Mr. F. W. KIMBALL,
Manager Construction.

Dear Sir:

I wish to call your attention to the unsettled right of way at station 400, 470 to 500, 540 to 560, south of Lawson, and request that as little further delay as possible may be given us there. We have a large force on the work and already considerable inconvenience and expense has fallen upon the contractor through attempting to open the work at those vari-

ous points and afterward being obliged to abandon them and shift the force off.

Respectfully yours,
W. W. HEGEMAN.

I also sent to Mr. Kimball the letter now shown me, dated February 1, 1887, by mail.

The letter was offered and received in evidence, marked **Plaintiff's Exhibit No. 5**, and read in evidence as follows:

FEBRUARY 1st, 1887.

Mr. F. W. KIMBALL,
Manager Construction,
Milwaukee, Wis.

Dear Sir:

W. E. Dorwin & Co. have served us with notice that if the Hannibal crossing near Minnaville is not settled so they can do their work in the favorable time of the year, or in short, if the delay in procuring the right of way forces them to do the work in wet weather, that the added cost of doing the work will be charged to us on force account. Cannot the right of way be procured at this point so that in case a favorable opportunity offers we can have him get at that work and finish it before the Spring rain comes on.

Respectfully yours,
W. W. HEGEMAN.

On February 28, 1887, I also addressed and sent this letter to Mr. C. A. Carpenter. Mr. Carpenter succeeded to Division C after Mr. Dunbar and another gentleman whom I don't recollect at present had been in charge.

The letter was offered and received in evidence and marked **Plaintiff's Exhibit No. 36**, and read in evidence as follows:

712 FEBRUARY 28th, 1887.

C. A. CARPENTER, Esq.,
Division Engineer,
Lawson, Mo.

Dear Sir:

Please note copy of Mr. Kimball's letter enclosed, regard to Hannibal crossing near Minnaville. I met Mr. Dorwin at Kansas City yesterday and I gathered from his statements that there is a considerable piece of the line immediately west of the Hannibal crossing where the right of way is not yet settled. Mr. Dorwin has very large interests that require his attention, and he is anxious to complete his contract with us without further delays. Can you not urge
713 a settlement of the question so that he can go ahead? There seems to be a misunderstanding somewhere, as Dorwin states that he has positive orders to do no work west of the Hannibal track. I have yours in regard to the Dwyer cut. Please accept thanks.

Yours truly,
W. W. HEGEMAN.

The Hannibal and St. Jo. Road at the Minnaville crossing was originally designated for a grade crossing, but we afterwards exchanged tracks. They fought that crossing for a year and a half. It was originally intended to cross there at grade; but it was arranged that we should grade a new line for
714 them and come down and take their old line, just keeping inside. This Minnaville crossing was not procured until the latter part of October, 1887; then the arrangement was consummated to change the tracks. We built a roadway for the Hannibal more to the south, nearer to the Missouri River, and took their old roadbed. As we reached the bridge they had their final terminus farther up the Missouri River than the Chicago, Milwaukee and St. Paul; farther to the west if you like. We crossed over them again at the terminus of the bridge. There was another crossing at the bridge. The abutment

of the bridge came inside of the Hannibal track. That we did not get until the latter part of October, 1887. The Chicago and Milwaukee people made the negotiations with the Hannibal and St. Jo. to change the track and alter that line. The right of way not provided extended from Station 1382 plus about fifty to Station 1410, a distance of 2,750 feet.

On August 31, 1886, I addressed and sent the letter now shown me to D. C. Dunlap, Division Engineer:

Letter offered and received in evidence marked **Plaintiff's Exhibit No. 9**, and read in evidence as follows:

OTTUMWA, IOWA, August 31st, 1886.

D. C. DUNLAP, Esq.,
Division Engineer, Chillicothe, Mo.

Dear Sir:

We are anxious to do the work at Gault, where it was at first intended to put the division terminal; but, as I now understand it, the probabilities are that the division terminal will be at Chillicothe, in which event it would alter our arrangements as to the manner of doing the work at Gault.

Kindly advise me if it is decided to build the terminal at Chillicothe instead. Also what plan of station ground will be used at Gault, if any, and whether the material to grade the same be hauled from the cut immediately east, or whether we can borrow from the sides to make the embankment.

Yours truly,

W. W. HEGEMAN.

On September 13, 1886, I addressed and sent another letter to Mr. Dunlap, Division Engineer.

The letter was offered and received in evidence, marked **Plaintiff's Exhibit No. 10**, and read in evidence as follows:

718 D. C. DUNLAP, Esq.,
Division Engineer,
Chillicothe, Mo.

Dear Sir:

Yours of the 10th inst. is at hand. I note what you say in regard to the station grounds at Chillicothe. Are you ready to commence operations there now? * * * Will you kindly advise me if the negotiations are completed in regard to the division terminal at Chillicothe, so that I may arrange to start foundations of the buildings at that point.

Yours truly,
W. W. HEGEMAN, Supt.

719 I remember how long we were prevented from starting foundations at the Chillicothe terminal. The question of the division terminal was not decided until the autumn of 1886, possibly in September. That is the division terminal where the roundhouse and shops were to go. It was originally decided to put them at Gault, some twenty-five miles north. Then Chillicothe came in for a claim for them, and several months elapsed until it was finally decided where it would be located. Chillicothe finally gave a subsidy and it was located there. It carried with it the division terminal and yards. That prevented
720 us from doing any work at Gault until it was decided which was in the fall of 1886. From the time we were at liberty to work there until the time we obtained the right to work there, the question was open for a period of five months.

On July 18, 1886, I wrote and sent the letter now shown me to D. J. Whittemore, Chief Engineer.

Letter was offered and received in evidence, and marked **Plaintiff's Exhibit No. 11**, and read in evidence as follows:

JUNE 18th, 1886. 721

D. J. WHITTEMORE, Esq.,
Chief Engineer.

DEAR SIR:

Yours of 16th inst. and profile of Randolph Bluffs line are at hand. I note what you say in reference to possible changes of line in the future, and will do no work west of Station 50 until further advised by you.

Respectfully,
W. W. HEGEMAN."

We were delayed on the Randolph Bluffs matter five or six months The final western terminus was not defined by the Company, and they ordered 722
me not to do work beyond a certain point, Station 50, until the location of the line was finally determined to the terminus at the Missouri River bridge. We got the order to resume work west of Station 50 about September, 1886. This delay was not attributable to the negotiation with the Hannibal and St. Jo Railroad to change the line; this is 1,400 feet further to the westward. It was due to the non-location of the bridge across the Missouri River by the Chicago, Milwaukee and St. Paul Railroad, and was occasioned by the failure of the Railroad Company to locate the line down to the bridge; that was a part of our contract to do. The Railroad Company built the bridge across the river; that was not 723
embraced in our contract. We were to build to the bridge abutment, and we couldn't get the right of way or the line located so that we could do our work there until November or December, 1886. And we were ready to go to work at it in the summer of 1886; in May, 1886.

On March 23, 1887, I sent the letter now shown me to C. A. Carpenter, Division Engineer.

Said letter was offered and received in evidence, marked **Plaintiff's Exhibit No. 13**, and is as follows:

724 MARCH 23rd, 1887.

C. A. CARPENTER, Esq.,
Division Engineer, Lawson, Mo.

Dear Sir:

Will you please advise me how soon the extra right of way bill will be procured for the borrow between stations 360 and 370 on Dwyer and Huntington's work?

Yours truly,
W. W. HEGEMAN.

That refers to the work of grading south of Lawson.

The extra right of way was required for the pur-
725 pose of getting material to make the embankment. Borrow pits were to be furnished by the Railroad Company under the terms of the contract. We were embarrassed by their not obtaining those borrow pits so that we could make embankments. At Station 360 and stations about 370 south of Lawson we were delayed until the summer of 1887, until about June, 1887.

On November 19, 1886, I sent the telegram now shown me to Mr. R. B. Campbell, the division superintendent, located at Marion, Iowa. He was division superintendent of the division that extends as far as Ottumwa.

726 The telegram was offered and received in evidence, marked **Plaintiff's Exhibit No. 14**, and read in evidence as follows:

11/19/86, 9.45 P. M.

R. B. CAMPBELL,
Marion, Iowa.

Please arrange to have supplies handled at the front promptly. Bridge gang of forty men idle since this morning waiting for material to be shifted from Blakesburgh to the front. Requests for the service disregarded by trainmen.

W. W. HEGEMAN.

On November 16, 1886, I also sent to Mr. Campbell the telegram now shown me. 727

The telegram was offered and received in evidence, marked **Plaintiff's Exhibit No. 15**, and read in evidence as follows:

NOVEMBER 16.

R. B. CAMPBELL,
Marion, Iowa.

Material loaded for front; been waiting two days for transportation facilities. Will you arrange to have it sent forward immediately. Engine 138 is attending track machine. There is no engine to haul trains to the front. Answer quick.

W. W. HEGEMAN. 728

I remember the circumstances of the delays at this point. While material was coming in at Ottumwa for us on the extension, there was a sort of a general daily delay in getting an engine to shift the cars in the yard and placing them for loading and unloading, due to not having engines enough for the service. They had but one engine to do this and their own work, and they would not furnish another. The delay suffered by the contractors from these causes continued almost daily during the fall and winter of 1886. I can't say positively how much the general work was delayed; there was a constant delay there. I should say that we did not make within ten per cent. as much progress as we should have made if the service had been adequate. That covers that whole period in the fall of 1886 until January, 1887. 729

On March 18, 1887, I sent the letter now shown me to Mr. F. W. Kimball, manager of construction:

The letter was offered and received in evidence, marked **Plaintiff's Exhibit No. 16**, and read as follows:

730 MARCH 18th, 1887.

Mr. F. W. KIMBALL,
Manager Construction.

Dear Sir:

On my return yesterday found your message of 18th inst. relative to more power for the lower division. It is reported to me that considerable delay was caused, but most on account of material not being delivered promptly.

Respectfully yours,
W. W. HEGEMAN.

On March 24, 1887, I sent the letter now shown to me to Mr. F. W. Kimball.

731 The letter was offered and received in evidence and marked **Plaintiff's Exhibit No. 17,** and was read in evidence as follows:

MARCH 24th, 1887.

Mr. F. W. KIMBALL,
Milwaukee, Wis.

Dear Sir:

I am just in receipt of the following dispatch from Mr. Ralston to Gault: "Where have all the cars gone? Working at great disadvantage for lack of them." Bridge foreman also telegraphs this morning in effect that he cannot get his switching done, and cars hauled, and fears that unless his work can be
732 done promptly he will hold the track by reason of not having the bridges erected ahead.

Yours respectfully,
W. W. HEGEMAN.

I remember the circumstances in regard to that.

At Gault, we made a material station for the delivery of bridge timber, ties, rails, &c., track materials generally. During March, cars were withdrawn from the Company that had been in service at this point, leaving us short of equipment for handling materials. We were also short of power at times for shifting and hauling material. Accord-

ing to the contract these were to be furnished by the 733
defendant.

While we were performing this work under this contract, we were required to put on the National nutlock, a patented article, as I understand. It is a washer, constructed on the principle somewhat of the spiral, of spring steel, and it is placed over the bolt, against the angle bar on one side, and against the nut on the other, the object being when the nut is set up tight to lock it. As you press the spiral together that makes a constant pressure against the nut. The bolt goes through the rail and connects the angle-bar. This washer is between the nut and the angle-bar supporting the joint. This nut-lock does 734
not come under any designation of track bolts or angle-bars or track spikes; the manager of construction, Mr. Kimball, told us to put the nut-locks on. I had a conversation with him about it. The conversation took place in my office in Ottumwa. I asked him what he wanted to do about the use of those nut-locks and about compensation for them, and stated to him that they were not embraced in the contract, and that I wanted to know his pleasure in the matter. He told me that he wanted them put on; that at that time it was a standard with the St. Paul road—at least that they were using them. As to compensation, to put them in place, that they would send them down and charge them to us, and 735
the matter would be adjusted finally at the end of the work; I objected to putting them on at the expense of the contractor. That was the occasion of his saying that it would be adjusted afterwards. The nut-locks were sent with the other track material by the Chicago, Milwaukee and St. Paul road, and charged to us and taken out of our contract under our protest; $9,558.63, I think was charged to us for these nut-locks.

I know how much has been paid on account of this contract by the Railroad Company. We have been paid in cash and material $3,809,340.06. The

736 total contract price was $3,954,600; that was reduced to $3,895,799.79. In addition to that there was something for material sold. We sold ties and timber and various things to the Company which amounted to $34,598.90, making the total earned under the contract and for material sold $3,930,397.69. In addition to this $50,000 was charged for transportation. That is provided by the contract.

The 97,000 feet, board measure, of bridge timber, alleged to have been taken and used by the Company during the washout south of Chillicothe, about June, 1888, charged at $2,425, was used after the completion of the contract. It belonged to Heman Clark. It consisted of squared timber of various
737 lengths and sizes, stored in the Chillicothe yard of the Railroad Company. It was surplus material left on hand. The Chicago, Milwaukee and St. Paul Railroad Company took possession of and used that material. There were washouts during a big storm in the summer of 1888, and to make temporary repairs this material was taken. There was no objection to the taking of it made by me at that time. 97,000 feet of it was taken. The fair value of it was $25 a thousand feet; the total would be $2,425. No part of that has been paid.

On March 3, 1890, I sent the following letter to Mr. Whittemore, Chief Engineer:

738 The letter was offered and received in evidence, marked **Plaintiff's Exhibit No. 24**, and was read in evidence as follows:

MILWAUKEE, March 3d, 1890.

D. J. WITTEMORE, Esq.,
Chief Engineer.

Dear Sir:

A considerable amount of track stringers 12 x 16 square timber of various lengths, and plank, the last item, I am informed, amounted to about 2,000 feet board measure, upon the completion of the Kansas City Line, was left in Chillicothe yard, and along the line of the road, the same belonging to the con-

tractor. Oak piling was also left on the line at various points, but I am unable to say definitely how many lineal feet of it there was. At the time of the washouts south of Chillicothe, during the summer of 1888, I am informed this material was used by your Company. Mr. Van Aiken states that he had an inventory taken and that there was about 196 M of pine timber and more than ten thousand feet of piling.

Will you kindly investigate the matter and credit Mr. Clark's account with the value of such timber and piling as was used.

Truly yours,

W. W. HEGEMAN.

It is my recollection that after this work was finished, I called upon the Chief Engineer of the defendant for the certificate and estimate referred to in Section 2 of Article 15 of the contract. I did not get it. I never got it. I think it was in February, 1888, after this work was finished that I called upon him for it; just after the completion of the work.

CROSS-EXAMINATION by Defendant's Counsel:

When I first became connected with this work I went over the line some time in the autumn of 1885, I think, to examine the line as proposed, for the purpose of making a bid on it later for Mr. Clark. I got the information as to the location of the line from Mr. Kimball and the other engineers. I was employed by Mr. Clark to do this. I was at that time Consulting Engineer for Mr. Clark. Mr. Kimball and I went over the heavy portions of the line. The line in the bottom lands, where it was flat, along the creeks and rivers, we didn't go over together. I went over it myself. We began at Kansas City and came away through to Ottumwa. We examined the country generally, as engineers do. I saw the general character of the country through which the road was proposed to be built. I went

742 over the terms of the contract with Mr. Whittemore in Milwaukee. There were bids made on the work, so I understood. We made our bids. They were handed in to Mr. Kimball in New York, at the general office of the Company. I think I was present when one part of the contract was executed. I went over the proposed contract with Mr. Whittemore in detail, and it was afterwards put in the hands of the legal department and other things put in which were not arranged by Mr. Whittemore and myself. I did not go over all the terms of the contract as it stands today, but generally the terms in regard to what work was to be done. I did go over the contract with
743 Mr. Clark before it was executed. I think we read the contract over before it was executed.

The terms of the contract as to compensation were closed between Mr. Miller and Mr. Clark, personally. At that time Mr. Miller was general manager—he is now president of the Company. I was present at that interview at the Gilsey House, New York City. I can't say exactly how long it was before the contract was signed. I was present in New York when the contract was executed on behalf of Mr. Clark. After the contract was executed I went on and had charge of the work and built the road; I had charge of the construction of the road for Mr. Clark. I had no interest in the contract. The
744 contract is in Mr. Clark's name. I had not a defined interest in the profits to be realized under it. There was no interest ever fixed. It was talked of, and nothing ever came of it. I made some kind of an arrangement with Mr. Clark about a contingent interest. The management of the work was left very largely under my control. The construction matters came under my charge directly. Matters of accounting and commissary did not. I represented Mr. Clark in construction matters. Estimates of the work done were sent to me as Mr. Clark's agent. I think the estimates were held by me and a summary sent to Mr. Clark. The price

to be paid for this work was not fixed on the basis of $19,500 a mile, not as to our bid. I think, in a general way, after the bids had been put in, Mr. Miller said to Mr. Clark: "We have concluded we will pay about $19,500 a mile. If that is satisfactory to you I will call it a trade." That was about the substance of the talk. He said that was a conclusion they had come to among themselves; that they were willing to pay about that. The gross price stated in the contract amounts, when divided by the number of miles, to about $19,500 a mile. It varied, because there were changes made. There were five or six miles lopped off that were originally contemplated, and there were other things; but approximately $19,500 a mile. When I speak of the price of the contract I mean the full contract price, the largest sum named. The full contract price, $3,954,600, is exactly $19,500 a mile for 202.8 miles. I recollect that there was some conversation as to whether it would be completed by the first of August or not, between Mr. Miller and Mr. Clark; and the conversation was something like this:

Mr. Miller said: "Now, suppose we don't get through by the first of August. How about what we would lose by it? We are in a hurry to get to Kansas City. We would lose business if we didn't get there by that date. Mr. Clark said, "I don't know. We will make every effort to get through by the first of August." Mr. Miller said, "Suppose you don't; what then?" Mr. Clark said, "How much will you lose?" Mr. Miller said, "I don't know. I suppose the loss to us would be something like $30,000 or $40,000." The conversation was general.

Mr. Miller said, "I think you ought to pay us that if you don't get in there by that time, if you don't complete by that time." (And my impression is that Clark acquiesced in that.)

Plaintiff moved to strike out that Clark acquiesced in that.

Motion granted. Defendant excepted.

748 It was entirely a question of how much business they would lose if we didn't get through.

Mr. Clark said that it would be possibly fair to pay them what they would lose by reason of not finishing in time, and loss of business, and there was a general talk that that should be fixed at about $30,000 or $40,000. I was not present when the final settlement was made with Mr. Clark.

Q. (Check dated March 9, 1888, for $173,532.49, shown witness.) Is the endorsement on that check in Mr. Clark's handwriting?

Plaintiff's counsel admitted that it is.

Said check was marked "For Identification B, April 26, 1895."

749

Ottumwa, Iowa, where the road commenced, is on the Des Moines River, and the road runs generally in a southwest direction into Kansas City, our contract terminating at the Missouri River, at the abutment of the bridge a little below Kansas City. It connected at Ottumwa with another road called the Marion Branch, belonging to the Chicago, Milwaukee and St. Paul Railroad Company that had already been built down to Ottumwa when we commenced building the Kansas City line, and we began at Ottumwa, including the crossing of the river. We began a little to the north of the river. We commenced at the old line, where it diverged
750 from the old line in Ottumwa. The work was commenced in April, 1886. There were no delays on our part; not that I am aware of. The major portion of the work was done by sub contractors; generally all of it. We made contracts with sub-contractors. There are perhaps thirty of them. Then there were sub-contractors for building bridges. We had separate contracts with each of these. They were all under written contracts. I kept personal supervision over all of them. The claims of the sub-contractors are all settled for, and were settled in 1888, with the exception of a suit brought by King & Wetherill and another suit brought by

George S. Good & Co. Every claim of the sub- 751
contractors was settled. And at the time of the closing of the general settlement with the R. R. Co. they were all settled except the King & Wetherill claim and one other that I have mentioned, that of George S. Good & Co.. I know as a matter of fact, that King & Wetherill brought a suit against the Chicago, Milwaukee & St. Paul Railway Company and filed a lien against the road for their claims. I think about $22,000 was the gross amount of their claim. I couldn't tell you the amount of George S. Good & Co.'s claim. I think they got judgment against Clark. I know there are no other claims of sub-contractors or lienors that are outstanding. There were some small damage claims 752
which were adjusted afterward, but they were trifling matters, little, petty cases; damages to stock and damages to land, and fences left down, little trifling affairs. Those were settled along in 1889 or 1890. That went through the Claim Department of the Railroad Company, and payments were made on our authorization out of the $40,000 reserved for that purpose.

There was a considerable amount of surfacing finished by the Railroad Company itself, under the contract of July 12, 1887; ballasting. They found that the mud track would not stay up. The track was laid continuously at that time to a point near Elmira, from Ottumwa. Elmira is the second sta- 753
tion south of Cowgill. It did not reach so far as the Elmira station, because the track was held up by reason of a bridge, the plans of which were defective and the plans of which we had to reframe and re-erect. The contract of July 12; says that the south line of the track was at that time at Cowgill. It was about there. That was as far as the tracklaying had gone. I think there was something in the contract about accepting it in sections. I did not understand that it was to be built in sections. The letter now shown to me was written and signed by me. I sent it to Mr. Miller.

754 Said letter was offered in evidence by defendant and is as follows:

"OTTUMWA, IOWA, November 10, 1886.
ROSWELL MILLER, Esq., General Manager, etc.,
Milwaukee, Wis.

Dear Sir:—I am in receipt of your two favors of November 8, in relation to transportation of material engines, cars, &c., from Ottumwa to Gault. When that contract was framed it was my understanding that the track should be laid from Ottumwa, and I therefore consider that in sending material, engines and cars around to Gault and then laying track from that point that we are to stand all expense of
755 transportation from Ottumwa to Gault.

Respectfully yours,
W. W. HEGEMAN."

Liberty was about twelve or fourteen miles, I should think, north of the Missouri River; away down at the southwest end of the line. Our track laying reached Liberty, I think, in October, 1887. That was to the northeast of the Minnaville Crossing; four or five miles possibly; a short distance. The track did not reach Liberty until about October, 1887. In June, 1886, we had forces all the way along from Ottumwa south and into Missouri, even at Liberty, Missouri; the heavy work there
756 was opened. We had commenced or were about to commence work at Liberty. We had not laid any track at all from Ottumwa at that time. We did not begin track laying until about September, 1886. I didn't say we were not ready to lay track there. I say the track had not reached there from the north until about October, 1887. We could have laid track there before it had reached there from the north, but it would not have been practicable or possible under ordinary conditions governing railroad construction. You have to have a base of supply. I stated that we did not reach there until October, 1887, with the track. We were not

delayed in the track laying at Liberty by reason of 757
any lack of right of way. At Liberty the work was very heavy; in fact, that whole southern division was heavy grading, and there was a bunch of heavy grading on the north end. And in asking for the right of way promptly it was simply to get that right of way in time so as to get the grading out of the way. By the time that we were ready to lay the track there the grading had been completed. We began grading at and south of Lawson in the spring of 1886. I don't recollect what month. We began grading almost immediately after we got the contract all over the heavy points—not all over the line. There was some bottom work we had to leave until the dry season came, so as to take advantage 758
of that. We got down to the stations I have mentioned south of Lawson, with the track laying, some time in the fall of 1887. We began grading there in the spring of 1886. The work was not completed until the fall of 1887. The part of the work from 410 to about 416 or 415 was completed in the fall of 1887. From 470 to 500, I think, was completed in the fall of 1887. It was very heavy work there. My recollection is that the whole top of the bank was brought up in successive sections, and it was finished in the fall of 1887. The work was commenced in 1886—in the spring or early summer of 1886—from the Fishing River south. It was all finished together, practically at one time, in the fall of 1887. 759
The Minnaville Crossing was down near the southwest end of the line, south of Liberty, and, of course, south of Lawson. That is the point where we joined track, at Minnaville Crossing. We shipped material around and laid track from a point near Minnaville to the Kansas City bridge, and made a connection at Minnaville after the 20th of October, 1887, when it was made possible for us to connect there. We went from Minnaville down to the end of the line. We laid down to it from the north. We reached there about the first of November or

760 the last of October, 1887. This Minnaville Crossing was the last thing we did. We joined there—late in October, 1887, I think. At the time we got the track down there to the Minnaville Crossing the arrangement was completed by which we could go on beyond, across. We had sent another force and laid that track on the other side of the crossing to the bridge, so that the company would not be held up. So that at the time we got down with the track laying we could go right on and make the connection, and were not delayed.

We were delayed by a bridge near Lawson some time in August, 1887. It was a bridge at a place
761 called Chickenbristle. It was an ordinary trestle bridge, and by reason of defective plans had to be taken down and re-erected. The delay was three or four weeks. It was finished sometime in August, 1887, I think. We began erecting it during July, and we re erected it in August, 1887.

At the time we got there to the crossing, from the north, the track had been laid from just across the crossing down to the bridge at Randolph Bluff. The grading from the Minnaville station to Randolph Bluff was not done until October, 1887; just finished in time to make the connection. The connection was made in the latter part of October. The grading commenced on that portion of the line
762 only ten days or two weeks before that. It was completed and the track laid about the 20th of October, 1887. The grading was in progress between Stations 360 and 370 for nearly eighteen months continuously. The track laying reached there some time in October, 1887. The grading was commenced there in the spring of 1886. It was continuous along during all that time at the heavy points. The four telegrams now shown were all sent by me.

Said telegrams were offered in evidence by defendant, and are as follows:

Exhibit No. 18.

" OTTUMWA, April 11th, 1887.

F. W. KIMBALL:

Please send us some nut locks immediately. We are entirely out.

W. W. HEGEMAN."

Exhibit No. 19.

" OTTUMWA, October 3rd, 1887.

F. W. KIMBALL:

Please ship us car load of track spikes and thirty boxes nut locks.

W. W. HEGEMAN."

Exhibit No. 20.

" OTTUMWA, October 7th, 1886.

F. W. KIMBALL:

Foreman reports that there are no nut locks on hand.

W. W. HEGEMAN."

Exhibit No. 21.

" OTTUMWA, November 13th, 1886.

F. W. KIMBALL:

Please ship immediately angle bars, bolts, spikes and nut locks for twenty miles track at Gault. Hurry for crossing frogs.

WM. HEGEMAN."

Witness continues: I stated that $3,930,397.69 was the amount earned under the contract and for

766 material sold to the company. Of that amount I said $34,598.90 was material sold by Mr. Clark to the company. Those materials were bridge ties, some grade ties, timber, various construction materials. I think there was some bridge timber. I have not got a statement of what those items were. Deducting that $34,598.90 from $3,930,397.69 leaves $3,895,798.79. That would be the gross amount, as I understand it, earned under the contract. I arrived at those figures in this way: These accounts were made up by our bookkeeper, and the accounts as to freight charges, &c., our account, was made out, and a counter-account made out by the Chicago, Milwaukee and St. Paul, and the two book-
767 keepers got together and checked their accounts and that is the result of it, a statement of it. Our bookkeeper went to Milwaukee to make this comparison from Ottumwa. I can't recall from memory the items that make up this $3,895,798.79. I have a statement of the gross amount, not of the items, because that involved a whole lot of detail. For instance, we put in split switches where the contract provided for stub switches, and a price was fixed for it. It was really a supplemental contract fixed for that. There were many changes made along the line, and these were adjusted when these two men got together. All I am able to state about it is from the statement
768 given to me by our accountant. I know it is right. I don't know how I can explain that to you. But I know the matters were settled and adjusted at that time. There is a deduction for that supplemental contract for the amount fixed in there. It shows for itself; $37,000 or $47,000 in one lump. I did not have anything to do with the adjustment of this balance, the determination of the amount that was due or had been earned under the contract. The Accounting Department did all that. All those accounts were kept by our bookkeeper. He reported to me. I have not got the items. To me were returned monthly estimates during the progress of

the work. No other estimate when the work was completed. I was not authorized by Mr. Clark to go out there and go over the amount with the Chief Engineer and have the amount that was earned under the contract adjusted. I was not authorized to do anything of the sort. No other estimate than the monthly estimates. There was a last estimate on each division, marked a total estimate, which was returned to me; three separate estimates, as I recollect. I was not present when they were adjusting the account. I do not know of my own personal knowledge that the company's bookkeeper assented to this figure. They took up all these little details and checked their accounts back and forth, and our bookkeeper reported to me. I asked for a final estimate and never got one. They insisted on making them total estimates. They wouldn't use the word final; they never used it. I think in February, 1888, I went to Milwaukee and saw Mr. Whittemore, and that time was coincident with the time I speak of that the bookkeepers were fussing around with the accounts. I am not sure whether they made them up at that time or a week or two later. When they were made up I don't recollect whether I went over the matter with Mr. Whittemore at all. I won't say I did not. I remember being in Milwaukee about that time. I can't say how long I was there; two or three days possibly. I went there with our bookkeeper for the purpose of adjusting the accounts between the two companies, a final account; just the debits and credits standing on the books. I think that that was the basis of an adjustment of the account. It was the formal comparison of the accounts by the two bookkeepers. I call it formal, because it was double entry accounts kept on both books. They had a Construction Department separate and distinct from the Engineering Department, and our Accounting Department and their Construction Department had accounts in common, back and forth. It was for the purpose of taking up and checking these

772 open accounts that these men got together; to ascertain definitely results, so that the parties could come to settlement; that was done. Mr. Whittemore, I think, was not present during the arrangement of this accounting, because it was a department separate and distinct from the engineering department. I don't recollect what I did see Mr. Whittemore about; I think, possibly, taking up these various items. Mr. Kimball was then the executive head of the department with which we came in contact. Mr. Kimball was the manager of construction, Mr. Whittemore was the Chief Engineer and the one designated under the contract to make a final settlement and estimate; certainly, he was to make a final
773 estimate. I presume I did at this time ask him to make a final estimate; I am quite sure I did. I say that we never received a final accounting, marked final estimate; it was marked total. I mean that the Chief Engineer always evaded the term final, and never used it. He used the term total, and everything is marked that way. We did finally reach an agreement as to a formal accounts, where there was no dispute. I mean that I had notified them about the nut locks, and my instructions were to go there and fix up this account, and matters there was any controversy about to leave for other parties to take care of, matters which have been mentioned like the nut locks. I did present this question of
774 the nut locks to Mr. Whittemore. He wouldn't decide the question; he turned it right off; he turned it over to the Legal Department, and they replied and turned the claim down. I afterwards saw Mr. Miller about it; I went to him with it months after; after February, 1888.

Q. When you say you never could get a final estimate from Mr. Whittemore, do you mean that he did not make a certificate of the amount which was due to Mr. Clark, under this contract, which he had earned? A. I understand that the Engineering Department made up a statement of the accounts. I think embodied in that result was the account as

agreed upon by the bookkeepers as to formal matters. I understand that Mr. Whittemore would not call that a final estimate. That paper was sent to New York. It was not sent to me at all. I say that he never made to me a return of a final estimate. I think I have seen a paper in the nature of a final estimate, or in the nature of an estimate of the amount due to Mr. Clark under this contract, made by Mr. Whittemore. I have seen what purports to be a copy of a voucher, on which a payment of $173,000 was made to Mr. Clark. That is the only thing in the way of a final estimate that I have ever seen. I didn't read the paper. I only read the signature of Mr. Clark which you showed me. I said that the two bookkeepers adjusted the accounts, the debit and credit accounts, between the Railroad Company on the one hand and Clark on the other, using $3,954,600 as the basis to go on, and deducting the amount specified in the supplemental contract of July 12, 1887, and adding and deducting other items which had been agreed upon during the progress of the work, such as increased compensation for substituting split switches for stub switches, changes as to stations, deduction for the shortening of the line from Harlem to the Randolph Bluffs, and various other minor items. It was by comparison of accounts. A statement was made up at that time showing the changed total amount of contract. I mean that starting with the price fixed in the contract, $3,954,600, there were various other things provided in the contract which would change that amount, formal matters; that is to say, if you didn't build to Harlem, and you came back to the Randolph Bluffs, you were to take off so much; that there were during the construction of the work changes made as to various things, at which prices were agreed upon that we should deduct or that they should pay increased compensation for; and that all these entered into the making up of that account as plus or minus quantities, and that the result of this adjustment or making up of the

778 account was the amount earned under the contract. A balance was taken off, as I understand it. A statement was made of the amounts deducted and the amounts added. I had some talk with Mr. Kimball; some talk with Mr. Whittemore. I remember the question of nut-locks was up, and I remember there were other things, like an extra bill for labor on a bridge where the plans were defective, and there was a question of an extra voucher to be passed. I think questions arose as to whether they should pay them or not. They consulted with me about what the additions were that should be made, and what the deductions were that should be made. There was one instance of an extra bill for labor on
779 a bridge; and about whether they should pay for the nut locks, or were they to turn it down. I say there was a balance struck. My bookkeeper at the time made a statement or took off a balance, a result, and rendered it to me. All I am talking about now is the result of it. I haven't the details of any statement made of how that was arrived at, of the deductions that were made from the aggregate price. They started with the aggregate contract price, $3,954,600, and they made certain deductions. No statement of those deductions. No statement of those deductions was made by me, nor was any shown to me, any made up by these bookkeepers; not that I recollect. There was not any statement
780 made of the additions that I recollect. I don't know anything about the detail of it. There was a contract as to the deductions, the supplemental contract of July 12, 1887. It states the number of miles and the amount to be deducted for each mile. The aggregate amount that was to be deducted is not stated. Then there was something in the original contract that provided for a deduction if the line was built to Randolph Bluffs instead of to Harlem Station; that was fixed in the contract. That was arrived at I think by the actual number of miles deducted at so much per mile. Whatever the contract said about it was done at

that time (Witness examines original contract), 781
3.45 mile at $4,970 a mile. It is fixed in the contract. That must have been deducted. I don't know by whose authority or directiion. I don't know whether as a matter of fact it was done by Mr. Whittemore, as Chief Engineer, under the contract. I never knew that there were any additions to the contract price. I say for material sold there was a result arrived at of some $34,000, or something like that. It was made up by the bookkeepers from data turned in at the office; turned in by some of our subordinate men on the line; an inventory was made up and turned in to the bookkeeper. I say that they took off a balance. In taking off that balance they did not include this item 782
that I refer to now. This, as I understand it, was part of the bill of $34,000 for materials sold. That $34,000 was not, I think, any part of the sum of $3,895,799.79, which I say was earned under the contract or was ascertained to have been earned under the contract. I don't know that it had anything to do with that settlement or statement that the bookkeepers made. I understand that was for a trade outside of the contract; that it was for materials and stuff taken off our hands, like ties and possibly rails and bridge timber, and various other things, spikes and bolts, what was left over. That is as I understand it. I represented Mr. Clark in all these matters. All these claims for extras 783
that we make against the company were not all reported by our sub-contractors. I did not know of all these claims at the time of this adjustment or settlement, the time this balance was made up; not all of them. I did take up the questions of Howe truss bridge and nut-locks. I don't know how they arrived at the balance. When this balance was made up by the bookkeepers the amount was stated to me I presume. I don't know that I examined it. The Construction Department had given certain data to our bookkeeper, and it was reported to me that they agreed to various items. Therefore I concluded it

784 was correct. That was the only way I know it was correct. I understood that this was made up by data or certificates furnished by our Construction Department. I had interviews with both Mr. Kimball and Mr. Whittemore at the time these accounts were being adjusted, and my recollection is that they were mainly with Mr. Kimball. I submitted to Mr. Whittemore questions, for instance, like that of the nut-locks, which they had put off adjusting until the work was completed themselves. The nut-lock question came up immediately when that material was furnished, and they said let it go until finally when these accounts were being fixed I had made up a bill for nut-locks.
785 Mr. Whittemore wouldn't consider it at all; he wouldn't decide about it. I think I spoke to Mr. Roswell Miller about a brakeman who was killed. Then there was something about the bill for a bridge that was taken down and re-erected and that I think was adjusted with Mr. Whittemore or one of his assistants. In all these matters I represented Mr. Clark—I was his representative. I did not go out there for the purpose of adjusting and settling all these matters. I was there in charge of the work, and I went to Milwaukee at this particular time—about the time the work was all finished. I went there because we were expecting a party from New York to come out there and take up these final ac-
786 counts, and for some reason or other he didn't come, and my instructions were to go there and settle up these formal accounts, and if there were other things, Mr. Miller being a fair-minded man, to leave it to Mr. Miller; not to question or discuss. The taking off of these balances, back and forth, was done; I don't recollect that that result was not certified to Mr. Whittemore. I know that under the terms of the contract Mr. Whittemore, the Chief Engineer, was appointed umpire to decide all questions as to the construction of the road or arising under the contract. I mean that there was no certificate ever sent to me that I know of or recollect.

I mean distinctly to say that it was not furnished to me. I testified that I had seen what purported to be a copy of a voucher. 787

(Paper shown witness.) This is the paper that I refer to. I don't know whether this is the same paper which was shown to me before and on which I recognized the signature of Mr. Clark. I have not compared the papers. That is a paper mailed me by Mr. Whittemore about two years ago. And, as I understand, purports to be a copy of a paper signed by Mr. Clark. It was enclosed to me in a letter, and I don't know what has become of the letter. I don't know anything about any final estimate, and I have testified that they never had any final estimate. It never was furnished to me. I wouldn't testify to what Mr. Whittemore did. I was not in Milwaukee at the time this statement of which I have to-day produced a copy was made up that I know of. I was in Milwaukee in February, I think, of 1888. I recognize this item of $34,598.90. That was the material sold. I think that was adjusted while I was at Milwaukee. I do not understand that I ever saw such a paper as that in Milwaukee. I first saw it some time subsequent to April, 1893; that is my recollection. 788

I have not a copy of Mr. Clark's bid. Our bid was different from the amount that was finally fixed as the contract price. I was present while Mr. Miller and Mr. Clark discussed the matter. It was all between Mr. Miller and Mr. Clark, and possibly myself. I was present. I think some matters were referred to me by Mr. Clark during this conversation and negotiation. That occurred at the Gilsey House here in New York. I cannot give the exact date. I think there was a sort of a compromise arrived at on the basis as it figures out of $19,500 per mile for the 202.8 miles. It was after this that the form and particulars of the contract were settled upon and drawn up in Milwaukee. By direction of Mr. Miller, Mr. Whittemore and myself jointly blocked out this contract. I represented Mr. Clark. 789

790 The details of the work that was to be performed by Mr. Clark were arranged between Mr. Whittemore and me at this time; partly so. I think possibly Mr. Kimball may have been consulted by Mr. Whittemore. But Mr. Whittemore and myself blocked out that contract together. When it was finally completed and put in shape it was sent to New York, executed on behalf of the company, for Mr. Clark's execution on his part. It was executed by Mr. Miller on behalf of the company. It was not sent to me. I saw it before it was executed by Mr. Clark, and examined it. I don't recollect whether it was executed by Mr. Clark when I was present. I remember making some objections. I can't say
791 how long before it was executed by Mr. Clark I saw it. I raised a question as to the amount stated as compensation, and a correction was made on the contract; a correction was made to Article 15. The change was made from $3,914,600 to read $3,954,600; an addition of $40,000, after it was executed by Mr. Miller. That was made here in New York. I continued in charge of the work of the construction of this road until it was finally accepted by the Railway Company--until they took it and operated it. They commenced operating from Ottumwa to Chillicothe, a distance of about 125 miles, in the early part of the season of 1887; my recollection is possibly June or July; along about the middle of the
792 season. That was 125 out of 200 miles. The connection was made with the bridge at Randolph Bluffs about the first of November, 1887, and while the track was open for the passage of trains the Company didn't open for regular service until later. I don't know that there was any formal acceptance of the work. We finished up, and I think our men left there some time in March, 1888. I came away before that. It was at a later date than about the time of this settlement and adjustment of accounts that I spoke of was made, because I remember we left our accounting department there to wind up matters, and they did not finish until about the

first of April, 1888. I had gone away from there 793
in the meantime. I don't recall the date when the road was first operated through its entire length by the Company. Some time in 1888, I think. There were claims that I presented to Mr. Whittemore for allowance prior to or at the time of this adjustment in February or March, 1888, which were rejected; the claim for nut-locks, for instance, was referred to the Legal Department. He wouldn't decide it. That was finally rejected; notice was given that the Legal Department had decided against it. I was at one interview between Mr. Miller and Mr. Clark, at the Gilsey House. There was not more than one that I know of. That was the interview in which the question about the $40,000 penalty or 794
amount to be deducted was discussed. I should say that was Mr. Whittemore's signature on the paper now shown to me; it is; I have no doubt about it whatever. I have no recollection of having ever seen that paper before. It was never shown to me by Mr. Whittemore; not that I know of. I said no final estimate had ever been returned to me; that the estimate returned covering the completed work were marked total estimates. I said that he refused to use the word final estimate. The entire Engineering Department refused to use it. So far as I am personally concerned, he never returned any final estimate to me that I have any recollection of. I do not mean to say that he did not make one to the 795
Company; don't know anything about that. I never saw or had handed me or had furnished me a final estimate by Mr. Whittemore, that I have any recollection of. I don't recollect whether the amount that I have stated was arrived at upon this accounting and adjustment in February or March, 1888, was determined by this certificate of Mr. Whittemore, the engineer. Accounts were made up at that time. Mr. Whittemore made up no account at all. I say that the result of the adjustment of those accounts was the showing that there was earned under the contract and for materials sold the

796 sum of $3,930,397.69. The amount of the material sold was $34,598.90. Deducting $34,598.90 from $3,930,397.69 leaves $3,895,798.79. Deducting what is shown here (on the paper signed by Mr. Whittemore before produced) as the amount of previous estimates, which is $3,867,734.01, from an amount which is shown here, $3,895,798.79, leaves a balance of $28,064.78, which is said to be the net amount of this estimate. I do not know that it appears that the aggregate amount of this estimate is $3,895,798.79, including the amount of previous estimates. It does say "Deduct previous estimates." It does say "Net amount of this estimate." At the beginning of the sheets of this paper which end with that
797 statement the heading is "For estimate of work done and material furnished up to date, building Kansas City Line from Ottumwa Junction, Ia., to Missouri River near Kansas City, Mo., as per contract, as follows." That says it is an estimate there. That is a different sheet. I stated that the amount which I claim was due, which was arrived at in February or March, 1888, was arrived at by deducting from the sum of $3,954,600, the contract price for the construction of the road, certain items for work not performed by Mr. Clark and other matters, and by adding certain other items to which he claimed to be entitled to credit. There was a statement made by the Chief
798 Engineer of the amount of the value of that work which was not built; that is, the difference in the line between Randolph Bluffs and the line as first projected to Harlem. There is an item appearing here of $39,226.44 for that difference. I know there was a statement made up of the cost of that line, and it must have been deducted of course in making up any statement of debits and credits. But I am not going to say that those are right. I don't know that they are. I do not know what was the aggregate amount of deductions from the total contract price made or allowed in February or March, 1888. I don't think I can give the deductions without the

additions, other than this extra bill of $34,598.90, 799
for extra work done outside of the contract, and for materials sold and things. All my statements of these figures are derived from somebody else's statement. I don't know anything about them myself, because I did not keep the books. I know what was added to the contract price at the time of arriving at the figures $3,895,798.79; there was at least $34,598.90 added for things done outside of the contract and materials sold to the company; I did not get any part of the $173,000 that was paid to Mr. Clark in March, 1888. It was to my interest to have paid exactly what that contract specified and covered. I can't say that it was necessarily to my interest that that amount should be as large as possible. I cer- 800
tainly wanted to make as much money as I could. The profit would be increased by the amount being greater; certainly the greater the amount the greater the profit. I went to Milwaukee to have these accounts adjusted, in the early part of 1888. I did not go there for a final settlement and I never got a final settlement.

This statement of the amount that I say was earned under the contract, arrived at in February or March, 1888, did not include the $50,000 to be charged Mr. Clark for transportation, under the contract. That was deducted afterwards, the $50,000. The gross amount under the contract was $3,805,798.79. Under the contract still we were to pay $50,000 for transporta- 801
tion which would make that amount $50,000 less. That was not deducted in those figures of $3,895,798.79. There were two items or classes of items for transportation which were to be deducted or paid by Mr. Clark; that is, transportation over the line of the Chicago, Milwaukee and St. Paul road to Ottumwa, which was fixed under the contract at a rate, according to quantity, so much per mile per ton, and a gross sum of $50,000 for the transportation of material and supplies over the constructed road as it was constructed, to the termination of the track. And that $50,000 was not deducted in mak-

802 ing up this amount of $3,895,798.79 determined to be earned. The payments which have been made under the contract to Mr. Clark in cash or in any other way were always made in New York. They were not made to me. The books show the amount that was paid under the contract. I didn't state any amount that was paid to Mr. Clark under the contract in cash at all. I didn't testify to it. I did testify that Mr. Clark had been paid $3,809,340.06. I testified from this memorandum which I have here; the same memorandum from which I testified as to the amount which was earned under the contract. That was arrived at from statements which I had before me, from items. My best information is that none
803 of these payments were made through me or to me. I do not, of my own knowledge, know anything about it, only so far as the statements made to me show. From my statements and memoranda it shows $2,760,265.06 was paid in cash. That includes the $173,532.49 paid on March 9, 1888. In this receipt of Mr. Clark's of March 9, 1888, the same date as the check of $173,532.49, it is recited: "Whereas the said Chicago, Milwaukee and St. Paul Railway Company has paid the said Clark, to apply on said contract, in money, material, labor and transportation, the sum of $3,626,865.20"; that differs from the amount which I say was paid by $182,474.86 That is, I state that $182.474.86 more was paid than Mr.
804 Clark's receipt recites.

Plaintiff's Counsel: We admit that on March 9, 1888, Mr. Clark received on account of this contract $173,532.49.

The Witness: Adding that amount to the $3,626,865.20, recited in Mr. Clark's receipt for the $173,532.49 as having previously been paid, makes the total amount paid to Mr. Clark $3,800,397.69 and the difference between that and the amount which I say was paid in cash and materials is $8,942.37; that is not the amount which I say was deducted for nut locks. It is not as large as the amount for nut

locks. In my statement of the amount paid to Mr. 805
Clark in cash and material I have taken into account the $50,000 chargeable to him for transportation in this amount of $3,809,340.06. The total payments should be $3,859,340.06, against which there would be a debit of $50,000 for transportation. The $50,000 is part of the $3,859,340.06. Really, the amount of cash and material which I say was paid to Mr. Clark or charged to him was $3,809,340.06. That included the transportation charges to Ottumwa on all material which came over their line. I do not know anything about this matter of $40,000 which was retained by the Company at the time of this payment of $173,532.49 to Mr. Clark on March 9, 1888; I know nothing whatever about that pay- 806
ment; I was not here. I don't know anything about that transaction which took place when this $173,532.49 was paid at all. The retention of a sum to meet claims against the Company was not a matter of discussion at the time I was out there in Milwaukee. I didn't know, as a matter of fact, that $40,000 was reserved to meet the claims of the class or kind referred to in that statement; not until after I had seen the statement. I was aware that the contract required us to hold them harmless from liens and for other suits for damages. That was by the different sections of Article 10 of the contract; that refers to all damage claims. I knew that at this time there were a number of claims presented 807
against the Company, some of which were in suit, for damages. I knew of a case in suit of King and Wetherill, and I knew of some very small and trifling claims outside of that. The Company had a whole lot of money belonging to us in their possession at that time; there was a whole lot of money due there for several months that they had not paid; more than this $40,000. I don't know as I can tell you the amount. I don't know anything about the March 9th transaction. In my statement of the amount that was paid under this contract I have included a portion of this $40,000 reserved as having

808 been paid out for claims; I think so. Of the items which I claim or admit were paid by the Company out of this $40,000 reserved there was one item of $1,000 paid to William H. Gridley, Mr. Clark's bookkeeper. There were several small damage claims which were settled through the Claim Department and authorized by us, amounting to between nine and ten thousand dollars altogether, I think. I have forgotten just the amount. I have no recollection of being in Milwaukee when this receipt was made up. I was here in New York early in March; I think before March 9th. I remember that I was snowed up in the blizzard, and I had been here several days before
809 that; that was the 12th of March. I am pretty sure I did not see that receipt until after I came to New York and after this $173,532.49 was paid, because I remember a controversy grew out of it between Mr. Clark and myself. I knew that Mr. Clark had signed a receipt some time, I think, in the spring of 1888, along in April or May; nearly five years before this time that I had a copy of it. I furnished the items that went into the complaint. And at that time I had this copy of this receipt before me.

I had the receipt before me which contains a statement of an item of $3,626,865.20 as paid to or received by Mr. Clark in money, material, labor and transportation; and I knew that by the receipt Mr.
810 Clark had also stated that by the terms of Section 4, Article 13, of the contract, he was to be charged in addition for transportation the sum of $50,000. But I do not recollect paying any attention to those items at the time. I knew that Mr. Clark had signed a paper containing this item of $40,000: "That by a supplemental contract he was to allow, by way of forfeiture, in case the railway was not completed by the first of June, 1887, the further sum of $40,000." Taking those amounts which the receipt states had been paid to Mr. Clark in cash—in money, material, labor and transportation, $3,626,865.20, and the $50,000 to be charged for trans-

portation under Section 4, Article 13 of the contract, 811
and the $40,000 by way of forfeiture in case the railway was not completed by the first of June, 1887, that makes in all as paid or chargeable under the contract $3,716,865.20. Deducting that from the sum of $3,930,397.69, which I have stated was the amount earned under the contract and for material sold to the Company or taken off the hands of Mr. Clark, leaves a remainder of $213,532.49. Deducting from that last mentioned sum the $40,000 reserved to meet claims pending against Mr. Clark and the Company, which are recited in this receipt, leaves a remainder of $173,532.49. That is just the amount of this check given to Mr. Clark on March 9, 1888. When I made up this memorandum in 812
which I stated what was due and earned under the contract, I had read over a copy of the receipt.

I knew that there remained but $40,000, according to that statement. I know there was $40,000 in amount reserved to meet damage claims, &c. I knew at that time that Mr. Clark had signed a receipt stating that he received this $173,532.49, in full satisfaction of all claims arising under this contract. I believe that is what it stated. I had a copy of it.

REDIRECT-EXAMINATION by Plaintiff's Counsel:

I was not present when this paper which has been called a receipt was signed. I did not know what 813
was in it when Mr, Clark signed it. I never saw that paper with Mr. Clark's signature until I came to this court. I do not know the truth of any of the facts stated in that paper, beyond what I see upon the copy that was shown me at the time I made up the account. I made up this account sued on in this action with plaintiff's counsel, and I adopted the figures of the Railroad Company to the extent of $34,598.90 in making up the claim. I left out any credit to the Railroad Company for the sum of $40,000 shown upon that copy of receipt, for forfeiture for not finishing in time. I left out, in making up

814 my account, also that portion of the $40,000 which was retained by the Railroad Company to meet claims, covering the King & Wetherill payment. I left out $19,500 for that King & Wetherill matter. I allowed for the payment of $20,500 out of the $40,000 reserved to meet claims. That $34,000 is for changing from stub switches to split switches, and for putting in things not in the contract, &c.; it doesn't include nut-locks.

Defendant's counsel offered in evidence the certificate of the Engineer and the receipt of Mr. Clark as a contradiction of the testimony of this witness.

815 The same was objected to by plaintiff's counsel as incompetent and out of order, and was excluded by the Referee, to which plaintiff's counsel took an exception.

We were embarrassed and delayed at Gault because the division terminal was not settled, consequently preventing us from doing any work of grading through the terminal yards and for a considerable distance south. We should have laid track from Gault southerly, but in consequence of the grading not being completed, we were obliged to lay track northerly toward a second force which was laying track southerly. We laid from Gault northerly during several months; meanwhile the
816 grading was in progress and finally completed south of Gault and we then laid toward Kansas City. We were delayed in grading quite seriously at Liberty, because it was heavy work and took a great deal of time to do, and the failure to provide right of way properly set the work back just so much. We were delayed in other parts of our work by reason of the failure to obtain the right of way at Minneville. I was not present at all when that paper purporting to be a receipt was taken or when any transaction in regard to it was had.

RECROSS-EXAMINATION by Defendant's Counsel: 817

Our price fixed for the contract was settled upon at a gross sum. It figures out on the total distance of 202 8/10ths miles at $19,500; but that was not our bid. I don't say that our bid was for a gross sum. It was in writing. Mr. Miller said that our bid had been received, and that they had talked among themselves, and they concluded that they would be willing to pay about $19,500 a mile. Our bid was accepted for the work, but our prices stated in our bid were not. The amount for which we made our bid was not accepted or agreed to by the Railroad Company. But our bid or offer to do the work was accepted. 818
We bid for the work as we were asked to bid. That was considered by the Board, and afterwards the General Manager said we have concluded to give you the work, provided you will make some concessions to price, and we have talked it over, and we are willing to pay about $19,500 a mile. And that was accepted and agreed to by Mr. Clark.

HEMAN CLARK, being duly sworn in his own behalf, testified as follows:

DIRECT-EXAMINATION by Mr. Kellogg, Plaintiff's Counsel:

I live in Portchester, New York. I have resided 819
in the State of New York for some time. In the fall and spring of 1886 I claimed my residence in Portchester. I lived both in Portchester and this city. I lived in New York State. During the entire progress of this contract I was living in New York State, either at Portchester or New York City. I had two residences, a country house and a city house. I am the Heman Clark that is mentioned in the contract between Heman Clark and the Chicago, Milwaukee and St. Paul Railway Company for the construction of the Kansas City Division, referred to in Exhibit No. 1, and I am the

820 plaintiff in this case. I first heard about the project of building the road, the Kansas City line, such as is covered by this contract, from Mr. Wadsworth; he brought it to my attention. I think Mr. Wadsworth was vice-president at that time of the Chicago, Milwaukee and St. Paul Railway. After several conferences with Mr. Wadsworth I was furnished with an approximate statement of quantities and items generally making up the work, the contract. I have never been called upon to complete my work there since it was finished. I think it was satisfactorily done, as far as I know.

821 CROSS-EXAMINATION by Mr. Bangs, Defendant's Counsel:

My bid is in writing, I think. I cannot state whether it was for a gross sum, or a certain price per mile, or what. I don't know exactly what conditions were mentioned in it, it is so long ago. After our bid was made I had some negotiation about it, with Mr. Wardsworth generally. I think Mr. Miller and I had some conversation, but Mr. Wadsworth was in supreme command then, and the engineers were under his dictation. Mr. Wadsworth is dead. I don't know how long ago he died. Several years. I do not remember that I had any negotiation with Mr. Roswell Miller
822 about it, after I had made my bid, in regard to the terms of the work. He was at one or two of the conferences, with Mr. Wadsworth. I do not think that I had a conference with him at the Gilsey House about the terms of payment for the work – not as to the terms of payment—I think it was as to transportation matters pertaining to his department. I do not remember that I had any interview with Mr. Miller in which he said the road, the directors, the board, had come to the conclusion that they were willing to pay me $19,500 a mile for doing the work. I think that, taking the aggregate of the work, the amount that we arrived at, it comes

to about that. The amount was not arrived at by 823
taking it at $19,500 a mile. I think it was arrived at by all the data that was furnished, and then by the stipulation in the contract that I might change or lower grades to save as much as I could in that way. I don't think the compensation of $3,954,600 was arrived at by a computation of the length of the road at 202.8 miles at $19,500 a mile. I don't so remember that as being the basis. I remember meeting Mr. Miller before this contract was finally completed, at the Gilsey House, in New York, for fifteen or twenty minutes, in the evening. I do not remember that there was anything in that conversation about the time when the road should be completed; that is six or seven years ago. I remember Mr. 824
Miller stating that they would like to have the work done at a certain time. I don't remember now what time. I know I told him I didn't think there would be any difficulty if the right of way was all obtained, and everything was clear for the work. These conversations were all prior to signing the contract. I don't remember that at this time anything was said about a penalty of $40,000 at either of these conversations that I had. I don't think there was anything said about the amount of the forfeiture. I don't remember it. It is so long ago that I am not positive about it. The copy of the contract which I have, which was delivered to me, was executed by Mr. Roswell Miller as general manager of the com- 825
pany. I understand that I executed the duplicate copy of this which the railroad company has. I think I executed it in their office here in New York because I see Dumont's name on it there. I couldn't say that Mr. Miller was not here. It is my recollection that this contract was executed in duplicate by Mr. Miller, the General Manager of the Company, and attested by its Secretary, and sent on here to be executed by me. I should say that was the way it was done. It is the fact that when it came here so executed Article 15, which specified the amount of the compensation, had the

826 amount stated in it $3,914,600 at the time it came here to be executed by me. I notice that the amount of the compensation to be paid for the work, as specified in Article 15, originally read $3,914,600. And it was changed, by interlientions and erasures, to $3,954,600, and that is noted at the end. I don't know that I have a letter from Mr. Miller to me, dated March 19, 1886, unless it is among the papers that Mr. Kellogg has. I could not state positively whether or not I received from Mr. Miller a letter of which the paper now shown me purports to be a copy; and still I might have received it. I don't remember. I do not at this time remember anything about such a letter.

827 I wouldn't state that I did not receive such a letter. I state that I don't remember receiving it; it does not refresh my recollection at all as to the matter of the price that was agreed upon, and the time for the completion of the work. Not at all. I do not remember making any answer to that letter, if I received it. I remember the payment to me on the 9th of March, 1888, of $173,532.49, by a check of the Railroad Company. My recollection is that Mr. Miller brought the check to my office here in New York. I do not think it was Mr. Bond. My recollection is it was Mr. Miller. I signed a receipt at that time, which has been exhibited here on a sort of final payment. I signed a receipt.

828

WILLIAM W. HEGEMAN, recalled, upon further cross-examination by defendant's counsel, testified:

I didn't say that we did not finish the work there until the early part of 1888, not strictly that. I said that there was some little work to be done after. I think some little work was done in 1888, in the spring. The Railroad Company began operating to Chillicothe, that is seventy per cent. of the line, in the early summer of 1887. The road was finally opened for the passage of trains about the first of November, 1887, to the bridge.

That was as far as they could go, be- 829
cause their work was not completed to Kansas City at that time; they could not get in. They ran to the bridge; they couldn't go any further than that. I have testified that our men finally left the work in March, 1888. The work was not strictly completed until that time; there was some little work that was done in the early spring of 1888. There was not considerable work that the railroad company took off of Mr. Clark's hands because it had never been finished by him. There was an express stipulation as to the track they wanted put up in a different way from what the contract provided, that we conceded to them; that was in July, 1887. They took off a considerable amount of surfacing and finishing up 830
of a large amount of track. It was in January or February, 1888, that I said I went out there to have a final adjustment of the amount we were entitled to under the contract; in March I went to Milwaukee with our bookkeeper, to go over the accounts with the parties. The amount of this work had not all been ascertained until then. I don't recollect that I said that the reason why these claims for extra work were not embraced in the settlement at that time was because they were not known at that time. I don't recollect as to whether I did know of them at that time. I did not go and have any settlement of accounts. When I did go to Milwaukee with the bookkeeper to make up and compare the 831
various accounts, this statement of excess quantities had been made up by me, this memorandum. At that time I did not, as I recollect, present this statement to Mr. Whittemore, or to anybody. I don't recollect that I ever made any claim in relation to any one of these items at that time. I think I did discuss informally something about the Howe truss bridges. I made no formal claim about it at that time, as I recollect. I don't recollect as to what answer was made about the item of Howe truss bridges. I can't tell you who I presented it to; either Mr. Whittemore or Mr. Kimball; it would naturally come to

832 them. I possibly discussed it with Mr. Whittemore. I don't think I gave a statement of this to Mr. Whittemore or anybody connected with the road.

DIETRICK VAN AIKEN, being duly sworn on behalf of the plaintiff and examined by Mr. Kellogg, plaintiff's counsel, testified as follows:

I live at Harrisonburg, Virginia, at the present time. I had some connection with this work of Mr. Clark on the Chicago, Milwaukee and St. Paul Railroad. I built the bridges and drove the piles. I remember a lot of timber—surplus material—that was brought for use on this contract, that was afterwards taken by the Railroad Company. I measured up some 97,000 feet of lumber that was left after our bridges were built in March, 1888. I mean bridge timber. I went back there the following summer and found it had been taken. I measured it up and found it was 97,000 and some few hundred feet. I haven't my memorandum with me, but it was 97,200 feet or 97,300 or 97,400 feet. Some of this lumber was in Chillicothe Yard. And some of it was along the line of the road. I personally measured that which was in the yard. Somewhere in the neighborhood of 50,000 feet was in the yard; and the rest was measured under my direction, along the line of the road.

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CROSS-EXAMINATION by Defendant's Counsel:

This was after the work was finished. We finished our work about the latter part of February or the first of March, 1888. I haven't any idea as to what became of this timber from personal knowledge; only from hearsay. I did not know the fact to be that a large amount of money was allowed to Mr. Clark for materials which he had on hand at the time the contract was closed. As a matter of fact, I do not know whether he was allowed for this timber or not. We had trouble in conducting our

work on account of the failure of the defendant to 835
obtain the right of way. My impression is that some portion of the work was stopped for as much as sixty days. On the farm of Mr. Wellman, they drove my partner away with shotguns. It was right in the line of the orderly proceeding of my work. It was in the summer of 1886. I know that my partner went there with his teams and men to do the work, and the father with his two sons came out with shotguns and drove them off. I saw the teams coming back from the work. We had to lay our men off because they could not work there that day. They went there to do the work. If we had been allowed to go on with our work, we certainly would have finished that portion of the work 836
sooner.

HEMAN CLARK, recalled, and examined by defendant's counsel:

I know there was some talk of a forfeiture, but whether it ever resulted in its being embodied in the contract or not, I don't remember. This conversation that I spoke of was had before the signing of the contract. I don't know where this conversation about the forfeiture was; or whether it was the one which I had with Mr. Miller at the Gilsey House, which Mr. Hegeman testified to. I think it was a conversation that I had 837
with Mr. Miller. I think any conversation in that line was had with Mr. Miller. I am unable to state what that conversation was. I remember only faintly that there was something of that kind said, but I do not remember that it was followed up to become part of the contract or agreement. I don't remember that there was $40,000 mentioned as a deduction or forfeiture or penalty. Something was said like this: "Would you be willing to forfeit a sum of money if you don't complete within a certain time?" and I think I said, "Yes, provided your line is clear on your part, and there

838 is no obstruction." This was all before the making of the contract, or before the contract was signed. I don't remember as to what was the amount of the deduction mentioned. I would not say that $40,000 was not the amount mentioned. I would not say that that was not the figure used, but I don't remember that it was.

(PLAINTIFF RESTED.)

Plaintiff's counsel thereupon moved to amend the complaint by adding the following:

839 "For a cause of action:

That prior to the making of the contract set out in the first cause of action herein the defendant falsely represented to the plaintiff that the amount of solid rock required to be excavated under the said contract was 119,365 cubic yards; that there was no loose rock; that the amount of culvert timber was 3,874,316 feet board measure; that there was 244,784 lineal feet piling; that there was 1,824 lineal feet of Howe truss bridging; that there were feet of bridge ties as being the entire amount of work of that class to be done in the completion of the contract above mentioned.

840 That the plaintiff made and entered into the said contract relying on the said statements so made by the plaintiff and believing them to be true.

That thereafter and in order to complete the remaining portion of the work under said contract the plaintiff was compelled to and did perform the following amount of work and furnish the following amount of materials instead of those as represented by the defendant, to wit: Excavating, 137,555 cubic yards of solid rock; excavating 89,200 cubic yards of loose rock; furnishing 3,837,905 feet board measure of culvert timber; furnished 276,436 lineal feet of piling; furnishing 2,701 lineal feet

Howe truss bridging; 291,840 B.M. feet oak bridge ties. 841

That by reason of the said false representations the plaintiff suffered great loss and damage, to wit: In the sum of $140,460.16, being the amount in value of the increased quantity of the materials above mentioned which he was required to furnish and the work above mentioned which he was required to perform in excess of the amount represented at the time of the making of the said contract.

For a cause of action:

That on the day , 18 , plaintiff was the owner of 97,000 feet board measure bridge timber of the value and reasonably worth the sum of $2,425, which said timber had been brought and placed upon the line of the work for use in completing the said contract. 842

That on or about the said day last above mentioned the defendant without the knowledge and consent of the plaintiff wrongfully took possession of the said timber and converted the same to their own use all to his loss and damage in the sum of $2,425.

For a cause of action:

That while the plaintiff was engaged in the proper performance of his said work under said contract the defendant wrongfully, negligently and unskillfully gave to the plaintiff wrong grades and lines under which to build the embankment and grade the roadbed of the said railroad, whereby the plaintiff was compelled to and did furnish to the defendant embankment or piling in excess of that required and called for in the contract in order to reach the grades above given to the amout of 385,000 cubic yards. 843

That by reason of the said wrongful, unskillful and negligent act of the defendant, and by their

844 said fault the plaintiff suffered great loss and damage, to wit, in the sum of $89,833.33⅓."

Defendant's counsel objected to the amendment being allowed on the ground that no amendment can be allowed where the amendment substantially changes the claim or cause of action; or any amendment which changes the action from one cause to another and different one, or an amendment which changes an action on contract to one in tort or fraud, or any amendment which adds inconsistent allegations to a verified complaint.

The Referee granted the motion to amend the complaint, as above; to which defendant's
845 counsel took an exception.

Defendant's counsel thereupon moved that the plaintiff be required to elect as to which of the causes of action he would rely upon; whether the original causes of action stated in the original complaint, or the causes of action stated in the amendments to the complaint allowed by the Referee to be put in on the ground that the amendments to the complaint set up alleged causes of action in tort with causes of action on contract as alleged in the original complaint, and also on the ground that the causes of action stated in the amendments to the complaint were inconsistent and inadmissible with
846 the causes of action stated in the original complaint.

The Referee denied the motion; to which denial the defendant's counsel duly excepted.

Defendant's counsel also moved to strike out the testimony of Mr. W. W. Hegeman as to the amount alleged by him to have been earned by the plaintiff under the contract, and as to the amount stated to have been paid to the plaintiff by the defendant, and as to the amount of the various and different kinds and classes of work done by Mr. Clark or his sub-contractors under the contract, or of materials of any kind furnished, on the ground that his testi-

mony in regard thereto is incompetent; that it is 847
merely hearsay and not the best evidence which could be produced, or the evidence required by the contract; that the Chief Engineer's certificate was, under the contract, the only competent evidence as to those matters, and the plaintiff had refused to put the Chief Engineer's certificate in evidence though offered to him by the defendant for that purpose.

Defendant's counsel also moved to dismiss the complaint as to each of the causes of action stated in the complaint, on the grounds that the evidence offered by the plaintiff was not sufficient to entitle him to recover upon the causes of action stated in the complaint; that such evidence would not be 848
sufficient to sustain a verdict for the plaintiff; that the plaintiff cannot recover under the first cause of action for the reason that by Section 2 of Article 15 of the contract the certificate of the Chief Engineer was required as to the completion of the work under the contract by the plaintiff, and as to the amount and value of such work, and that no such certificate had been produced or proved by the plaintiff; that as to the second cause of action, for extra work there was no competent or adequate testimony to prove or sustain it; that the testimony of Mr. Hegeman in regard to it was incompetent and was secondary and insufficient, and not the testimony or evidence required by the contract; and 849
that they were not claims admissible or for which the plaintiff is entitled to recover under the contract; that as to the third alleged cause of action in the original complaint it is not admissible under the terms of the contract; and as to the alleged cause of action stated in the first amendment to the complaint it is not a cause of action admissible with the original complaint, but inconsistent with it, one being on contract and the other in tort, and that there is no evidence, or not sufficient evidence to sustain it; that as to the alleged cause of action stated in the second amendment to the complaint it

850 is not admissible with the causes of action stated in the original complaint, one being on contract and the other in tort, and that there is not sufficient evidence to sustain it; and for the same reasons as to the alleged cause of action stated in the third amendment to the complaint; and on the further ground that it appeared that the plaintiff had been paid in full by the defendant for the amounts due to him on the estimates of the engineer of the Railroad Company and for all claims and demands of every kind, name and nature arising from and growing out of the contract between the parties, and of the construction of said railroad, and had acknowledged satisfaction of all said claims.

851 The Referee: I shall deny this motion, for this reason: I am not so satisfied with these two little items as to feel prepared to dispose of them. I don't think the testimony would justify me in finding these items for the defendant. Unless it does, there is a portion of the case, a ragged edge of it, left, even if I give everything else in favor of the defendant. I will assume that I would hold every other proposition in favor of the defendant, except these two. I say I am not satisfied with these two. I don't think the testimony would justify me in throwing them out. On the contrary, I think, while there may be a weak case presented on both of them, it is *prima facie* with the plaintiff. That
852 being so, I would have to keep the case alive for the two little things or for everything. I would prefer to keep it alive as to the whole thing. In that way I will get the defendant's testimony in its bearing on the questions I have expressed no opinion about.

The points on which I am not satisfied to decide the case in favor of the motion (I leave all the others out; I won't say whether I am satisfied with them or not), are the $40,000 item, in its relation to the $19,500, which only Mr. Hegeman claims is still outstanding, and the $2,425.

Defendant's Counsel: Do you mean to say that the plaintiff can maintain his cause of action to recover for the amount earned under the contract without producing the engineer's certificate? 853

The Referee: I have not said anything upon that subject.

Defendant's Counsel: I ask for a decision on that matter.

The Referee: That calls for an opinion from me which is not practical. I decline to decide that proposition at present. I shall be compelled to pass upon it at the end of the case.

Defendant's counsel took an exception to the decision of the Referee, and to the refusal of the Referee to decide the other questions raised and submitted. 854

Defendant's counsel thereupon asked leave to serve and file an amended answer to the original complaint, to make the answer conform to the proof.

The Referee allowed the pleading.

Defendant's counsel thereupon served a copy of this amended answer on plaintiff's attorney.

Defendant's counsel also served an answer to the amendments to the complaint. These appear in the judgment roll.

(*Pro ut* the proceedings).

Defendant's counsel offered in evidence the engineer's final certificate and estimate, which was previously marked "Defendant's Exhibit A for Identification, May 4, 1895." 855

Plaintiff's counsel objected to it, first, on the ground that it is admitted to exist in the pleadings; second, it is not the final certificate, or final estimate called for by the contract, and it is immaterial; third, it is incompetent, because the foundation for it has not been laid and stated. "I mean that the steps required under the contract have not been taken, necessary to

856 make it a proper, binding, final certificate. I also object to it further upon the ground that any decision contained in this certificate or paper, which undertakes to pass upon any question as to any dispute or misunderstanding as to the covenants or stipulations in the contract, or undertakes to pass upon or determine the construction of the contract, is illegal and void."

Objection overruled. Plaintiff excepts.

Said paper is received under its former marking, and is now marked, "Admitted January 11, 1896."

Defendant's counsel read the formal part of it as
857 follows:

"CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

CHIEF ENGINEER'S OFFICE,

Room 51, Chamber of Commerce.

MILWAUKEE, March 3, 1888.

"I hereby certify that the statement herewith attached is the final estimate of the amount and value of work done and materials used by Heman Clark in building the Kansas City Line from Ottuma, Iowa, to the Missouri River Bridge abutment at Randolph Bluffs, Missouri, under his contract
858 with this Company dated March 6, 1886, including all extra work done by said Clark, and that the said railroad agreed to be bult in and by said contract has been by said Heman Clark constructed. built, completed and finished in all respects in full conformity with the agreements of said contract, except as the said Railway Company, party of the first part, has, by agreement with the said Clark, assumed the construction and completion thereof, and the compensation therefor agreed upon has been deducted in said estimates from the amount which

would have been due and owing to said Clark had 859
he completed all of said work.

"In making monthly estimates and in this final estimate no deduction has been made for any part of the Fifty thousand dollars mentioned in Section 4 of Article 13 of the contract, and the amount in that Article specified should be charged against the estimates as made.

"I am also informed that a contract subsequent to the original contract was made, by which Forty thousand dollars was to be deducted from the contract price in case the work was not completed by June 1, 1887, instead of August 1, 1887, as specified in the contract.

The work was not completed until after August 1, 860
1887, but no deduction of said Forty thousand dollars has been made in the estimates.

Separate bills for these amounts are made and herewith returned.

D. J. WHITTEMORE,
Chief Engineer."

The statement attached to this certificate and referred to in it (without the vouchers and other memoranda attached), is as follows:

"THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. To HEMAN CLARK, Residing at New York City, Dr. 861

"1888, Mar. 3.

"For Estimate of work done and material furnished up to date, in building Kansas City Line, from Ottumwa Jct., Ia., to Missouri River, near Kansas City, Mo., as per contract, as follows:

"As per contract price..... $3,954,600 00

From which certain deductions should be made, as per statement marked "A," attached, as follows:

862	For difference between cost of line to Harlem and of line built to Missouri River Bridge.....	$39,226 44	
	For surfacing track, taken off Heman Clark's hands by C. M. & St. P. Ry. as per Suppltl. Contract, Dated July 12, '87, viz.: "88 06/100 miles, from Des Moines River to point near Newtown, Mo., at $100.00	8,806 00	
863	126 miles from point near Newtown, Mo., to Missouri River, at $250.00.	31,500 00	
	For the following buildings, which the C. M. & St. P. Ry. release Heman Clark from building, viz.:		
	"3 station houses at $2,300 ..... $6,900 00		
	"2 station houses at $2,500 ..... 5,000 00		
	"1 station house..... 2,200 00		
864		14,100 00	
	5 coal sheds at $1,300.....	6,500 00	
	1 section house.....	700 00	
	For the C. M. & St. P. Ry. agreeing to build 868 rods fencing covered by Heman Clark contract, at 15 cts. per rod; H. Clark having turned over to the C. M. & St. P. Ry. 895 posts and 4,340 lbs. (41 spools) wire, the same		

being the amount required in building the above 868 rods fence....	$130 20	865
" For the C. M. & St. P. Ry. agreeing to build in culverts under the H. Clark contract; 13,000 ft. b. m. timber at $6.00 per M. ft., Heman Clark having turned over to the C. M. & St. P. Ry. the 13,000 ft. timber required for this work....	78 00	
" For the C. M. & St. P. Ry. agreeing to furnish and set 48 whistling posts, under the H. Clark contract, at 1.45 per post	69 60	866
" For the C. M. & St. P. Ry. agreeing to spike track on bridges, under the H. Clark contract, as per list attached and marked A "1," as follows:		
3,194 ties at 5 3/10c....	169 28	
" For work done by the C. M. & St. P. Ry. Co. to complete steam heating in Chillicothe Round House, as per H. Clark contract, which was left undone by contractor, as per statement attached and marked A 2.....	16 64	867
" For Heman Clark's proportion of ditching at Liberty Cut, as per statement attached and marked A 3.....	382 29	

868	" For amount expended by the C. M. & St. P. Ry. in putting in drain for Ottumwa Round House and T. Table, as per statement attached and marked A 4	$289 17	
	" For amount expended by the C. M. & St. P. Ry. in putting in drain for Cillicothe Round House and T. Table, as per statement attached and marked A 4	801 66	
869	" As contractor has not laid to within $\frac{27}{100}$ miles of the required number of miles of side track, we are to deduct cost of material, &c., for same, as per statement attached and marked A 5	1,603 49	
			$104,372 77
	" Forward		$3,850,227 23
870	" Add for items not covered by contract, as per statement attached and marked "B," viz.:		
	" Extra length of Lawson Girder	$300 00	
	" Enlargement of Liberty Station building	350 00	
	" 344 c. y. Rip-rap, at $1.50	516 00	
	" 109 c. y. slope wall, at $1.75	190 75	

" C.y. stone ballast.....44,639			871
" Less amount used in foundations of Sta's and Sec. Houses 1,242			
43,397 c. y. at 40c...	$17,358	80	
" Difference in cost of 129 Split Switches, laid in track, and same number of common switches, as provided for in contract, at 23.....	2,967	00	872
" 40 Out-houses, at $40...	1,600	00	
" Material for one Section House, destroyed by fire while being stored in Niantic Station-house.....	273	22	
" For 75 rods Fence, built around Stone Quarry, between Randolph and Thornton, and around Haroldson's and Martin's land, at same place, at 70c.....	52	50	
" For difference in cost of putting in 6 in. Pipe at Water Stations in place of 2 in. Pipe, as called for in contract, as per statement attached and marked "B 1".....	4,709	18	873
" For furnishing material and erecting bridge at point one mile south of Ottumwa, where bank			

874 was washed out in February, 1887, as per statement attached and marked "B 2"..... $841 34

" For amount paid out by C. S. Good for borrow pits, &c., as per statement attached and marked "B 3"..... 4 50

" For extra work done on round house and turntable at Chillicothe, as per statement attached and marked "B 4"..... 128 44

875 " For hauling stone for intake at Polo, Mo., beyond the one mile limit referred to in Art. 8, Sec. 2, of Heman Clark contract 64 00

" For increased weight of iron in J. T. Clark splices furnished, over the weight represented to contractor at the time the contract was entered into, as per statement attached and marked

876 "B5," as follows:

"620,490 pounds at 1 65/100 cents.....	$10,238 08		
" Freight paid on same....	632 89		
		10,870 97	
			$40,226 70
" Forward			$3,890,453 93

" Add net amount of miscellaneous credits and charges to Heman

Clark, as per detailed statement attached and marked "C"..... $5,344 86

$3,895,798 79

"Deduct previous estimates..... 3,867,734 01

"Net amount of this estimate..... $28,064 78

B. G. L. J. M. E.

"Correct:
"J. C. FORD.
"Approve:
"D. J. WHITTEMORE,
"Chief Engineer.

"Approved:
"E. N. SEWALL,
"Comptroller."

"Charge account:
Kansas City Line.

"Received of the Chicago, Milwaukee and St. Paul Railway Company, twenty-eight thousand sixty-four and 78/100 dollars in full for the above account.

Dated , 1888."

Defendant's counsel offered in evidence the receipt or acknowledgment of March 9, 1888, signed by Mr. Clark, which was previously marked "For Identification A, April 26, 1895."

Said paper is received under its former marking, and is now marked "Admitted January 11, 1896," and is as follows:

"Whereas, a final estimate has been made by D. J. Whittemore, Chief Engineer of the Chicago, Milwaukee and St. Paul Railway Company of all the work done and material furnished under the contract made between said Railway Company and Heman Clark, bearing date March 6th, 1896, for the construction

880 of the railroad from Ottumwa in Iowa to the Missouri River, including all extra work performed and material furnished of every kind and description; which estimate, with the prior monthly estimates, less deductions made for work not done and work assumed by said Company amounts to $3,895,798 79

And, whereas, the further sum of .. 34,598 90

should be credited to said Clark for materials sold by him to said company and certain rebates and other matters of that description, making,

881 with the amount of said estimate, the sum of 3,930,397 69

And whereas, the said Chicago, Milwaukee and St. Puul Railway Company has paid the said Clark to apply on said contract, in money, material, labor and transportation, the sum of. 3,626,865 20

And whereas, by the terms of Section 4, Article 13 of said contract, said Clark was to be charged, in addition for transportation, the sum of. 50,000 00

And by a supplemental contract was to allow the said Railway Company, by way of forfeiture, in case said rail-

882 way was not completed by the first day of June, 1887, the further sum of 40,000 00

Making the amount paid on said contract, together with the allowance of said transportation and the allowance of said forfeiture, the sum of..... 3,716,865 20

Leaving the amount still due said Clark on said contract the sum of... 213,532 49

And, whereas, in and by said contract it was provided that the said Heman Clark, party of the first part, should save the said Railway Company free and harmless from

all claims that might be made against said Railway Company for liens of workmen and claims of sub-contractors, and from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle, and from all damages for cattle or other domestic animals killed or injured, and from all damages suffered by said sub-contractors and employees while engaged upon said work, of which said class of claims about $40,000, in amounts have been made upon and are now pending in courts by divers claimants against said Railway Company, and the sum of $40,000 of the amount so due as aforesaid under said contract to the said Heman Clark has been reserved and set aside by said Railway Company as indemnity or security for the payment of said claims and of such other claims of the same class as hereafter be made, in case said claimants or any of them recover judgments against said Railway Company, and the said $40,000 or the balance thereof after paying and settling such claims as may be established against said Railway Company is to be paid over to the said Heman Clark as soon as said claims are satisfied or said Railway Company suitably indemnified from any loss on account of the same, which $40,000 00

deducted from the said sum of 213,532 49

so as aforesaid due said Clark, leaves due and owing by said Railway Company and now payable on said contract to said Heman Clark the sum of 173,532 49

886 Now therefore, be it known that I, the said Heman Clark, have received of and from the said Chicago, Milwaukee & St. Paul Railway Company the sum of one hundred and seventy-three thousand, five hundred and thirty-two and $\frac{49}{100}$ dollars, ($173,532.49) in full satisfaction of the amount due me on said estimates, and in full satisfaction of all claims and demands of every kind, name and nature, arising from or growing out of said contract of March 6th, 1886, and of the construction of said railroad, excepting the obligation of said Railway Company to account for said forty thousand dollars as hereinbefore provided.

HEMAN CLARK."

887 WM. C. EDWARDS.

Defendant's counsel also offered in evidence the check that was previously marked "For identification B, April 26, 1895," the endorsement of which was identified by Mr. Hegeman.

Said check is received under its former marking, is now marked "Admitted Jany. 11, 1896," and is as follows:

Chicago, Milwaukee & St. Paul Railway Company.

"No. 1418. $173,532 49/100.

NEW YORK, March 9, 1888.

HANOVER NATIONAL BANK.

888 Pay to the order of Heman Clark One hundred & seventy three thousand, five hundred and thirty two 49/100 Dollars.

J. M. BOKEE, Ass't Sec'y. FRANK S. BOND, Vice-President.."

Endorsed "Heman Clark," and stamped "Mt. Morris Bank, Mar. 9, 1888, New York."

Plaintiff's counsel admitted that the check was paid.

DON J. WHITTEMORE, being duly sworn on behalf 889
of defendant, testified as follows:

DIRECT-EXAMINATION by Defendant's Counsel:

I reside at Milwaukee. My office is in Chicago. I am a civil engineer, and have been for forty-eight years. I have been connected with the Chicago, Milwaukee and St. Paul Railway Company since its organization in 1863, as its Chief Engineer. I acted as Chief Engineer of the Railroad Company during the construction and location of what was known as the Kansas City line of the C. M. and St. P. Railway Company from Ottumwa, Iowa, to Randolph Bluffs, Missouri.

It was understood that this was to be a proposal 890
for building the Kansas City line for a lump sum, specifying certain known quantities that the work would require, and that the other quantities we could not determine they were to take and assume the risk of the amount that would ultimately be required. I told Mr. Hegeman that was what I understood, and he assented to it. Mr. Hegeman returned to Milwaukee after I understood the award was made, and I was then directed to sit down and draw up the contract so far as the engineering or construction of the line was concerned, and at that time Mr. Kimball was present. We were several days at it in Milwaukee. Before commencing the contract I had to know what the terms were agreed 891
upon. Both Mr. Kimball and Mr. Hegeman assented to the terms as we drafted it. It was first understood that there were certain specified specific quantities of material that appear now in the printed contract. I mean of constructions. That the matter of earth work, rock work, bridging and culverts was indefinite; it was to be what would be required. That embraced all the provisions of the work to be done under the contract, and the manner in which it was to be performed. Mr. Hegeman assented to all those provisions. Mr. Kimball, I think, was immediately afterwards appointed Superintendent

892 of Construction. In the course of this construction of this road there were changes made in the grade of the road, both on application of myself and by Mr. Hegeman, in accordance with the terms of the contract. Those changes were assented to by both parties. The effect was, as they were changes by raising, to make the quantities greater than they would be shown by the profile as originally drawn, except in one particular, a change that was requested by Mr. Hegeman resulted in less solid rock work and, I think, less hauling. The terms and provisions of the contract as to the work which was to be done were embraced in the contract as it was finally executed; they were put in the contract as I
893 drafted them almost word for word. There were other matters in the contract that I did not draw, such as mode of payment. But that matter which pertains to the construction, the engineering construction of the work, was drafted by me in the presence of Mr. Hegeman, read to him, assented to, to me, by him, and then handed to the secretary of our Company, who put it in the form you see it here. I did make a final certificate of all the work that was done on this road (paper handed witness). This is it; I refer to the paper marked "For identification, Defendant's A, May 4, 1895, admitted January 11, 1896." That is certified to by me. After the work embraced in the contract was completed
894 Mr. Hegeman was in my office when I was ready to make the final certificate. He had his clerk in the office of the Superintendent of Construction adjusting the running account they had. When I was ready to commence the draft of the final estimate Mr. Hegeman and Mr. Kimball both came to my office. I then wanted to know all accounts that he had for extra work that was done in the performance of the contract, and I sat down at my desk, and I think Mr. Hegeman stood most of the time at my right and I think Mr. Kimball was on the other side of me. And I went through each and every account that is embraced in

this estimate. One matter was disagreed about— 895
Mr. Hegeman did not assent to it. That was the matter of nut locks. He claimed that he should have extra pay for nut locks. I claimed that it was included in his contract. I told him, however, that while that was my opinion, I would submit the matter to our attorney, and we went through all of the other matters, and when I got to the last—whether they are in the order here in this paper that we took them up, or not, I don't know, but when I got to the last one I turned to Mr. Hegeman and asked him, "Is that all?" He said, "That is all I have to present." I immediately went to work with my clerk and made the final estimate strictly in accordance without understanding there then, and it is 896
here contained in this paper. Each of the items that I have specified here as deducted from the total contract price, and each of the items which I have added to it, were assented to by Mr. Hegemen, except the matter of nut locks. That is not there. The only matter not embraced in that certificate in respect to which he presented any claim was the matter of nut locks; that is all. I mean that as I went through, item by item, he didn't claim anything else. I mean that he did not claim anything against my rulings—that he was satisfied with all of them. I was given to understand that thoroughly, and further than that, he did not make any claim for anything else in that certificate, except the nut 897
locks. In fact, when we got through, and I asked him, "Is that all?" he said that was all he had to present. There were other things besides allowed to Mr. Hegeman on account of material and supplies taken off of his hands at the time the contract was completed. That was done by the Superintendent of Construction. It is not in my final certificate. The last portion of the track finished was from Gault southward to Minnaville. They reached Minnaville the first of November, 1887

I do not know of any delays occasioned in the construction of this road by reason of lack of right

898 of way. There were not any delays on the road by reason of the lack of furnishing right of way by the Railroad Company that I know of, not of my personal knowledge. I had a conversation with Mr. Hegeman in regard to the matter of the forfeiture of $40,000, if he did not complete the road within the time specified in the contract. I cannot state the time. It was during the midst of the work, and probably at a time when we were apprehensive that the work was not going to be completed within the time specified in the contract. Mr. Hegeman was in Milwaukee, and I told him that it was doubtful, in my mind, whether he would not have to submit to the deduction of the $40,000 on account of non-com-
899 pletion of the work. His answer was that he thought he would not have to. He thought he would get through in time. That is what he stated.

The J. T. Clark pattern of splice joint consists of twenty pieces, two splice bars, six bolts, six nuts and six nut-locks, making twenty in all, for each joint, two splices to the joint. I have a drawing of those here which I produce. This is blue printed from the standard that was made in December, 1885. It shows as applied to a sixty-pound rail and also to a sixty-seven pound rail. The same splice was made to answer for both forms of rail. On that drawing where the nuts and nut-locks are is shown, one rail with the bolts and nut-locks on, the other has not
900 got the bolts through it; it shows just the hole. But this other one shows complete. Those were not in use on the Milwaukee and St. Paul Railroad at that time. They were introduced just after that. It was designed by our General Superintendent, J. T. Clark. Those were the plans adopted by us at that time, adopted on the railroad; they were adopted by the General Superintendent by the consent of the manager. The plan was made in my office. Nut-locks are included as part of that splice.

When Mr. Hegeman presented this claim for an allowance for nut-locks, the reason I gave to him for not allowing it was that the Clark splice, like all

other splices having angle-bars, was not complete unless some kind of nut-lock was used. It was universally used throughout the country wherever a splice joint was used at that time. That when he spoke of Clark splices to be used it meant the whole thing and contained twenty articles, twenty different members. He did not look at it in that light. I claimed that it was part of the track material. I said so to him. They are very generally in use now. As I estimated from statistics there were about 50,000 miles of railway with joints using the Verona nut-lock in 1885. The Verona nut-lock is the same thing. These nut-locks are known as the Verona nut-locks. As to the necessity for the use of these nut-locks for the construction of a first-class road it is deemed essential and necessary. That or its equivalent, one that accomplishes the same purpose, is necessary for the construction of a road in a workmanlike manner. It is necessary that such a nut-lock should be used. I never offered to Mr. Hegeman to allow for those nut-locks; nor did I ever say that he ought to be allowed for them. 901 902

I remember an occasion in 1890 when Mr. Hegeman came to Milwaukee. He called at my office. He told me that Mr. Miller wished to see me; he wished me to go down with him to Mr. Miller's office; I did so. Mr. Miller wanted to know about nut-locks. Mr. Hegeman was present. He was claiming compensation extra to the Clark contract for nut-locks. I gave my reasons to Mr. Miller why I had not allowed extra compensation for nut-locks, in Mr. Hegeman's presence; the reason that I gave was that it was included in the contract. I so interpreted the contract. And I then remarked that the final estimate had been made and payment made upon it and receipt taken, and I wondered at bringing the matter up at that late date. He also mentioned claims for excess of bridging, I believe, and the King & Wetherill matter was mentioned also. That was then in suit, as I understood. Mr. Cary, the General Solicitor of the R. R. Co., was 903

904 called in and heard my remarks about nut locks and my remarks about payments made and a receipt taken. Thereupon Mr. Miller sent to the Auditor's office and procured the receipt of March 9, 1888 (paper marked "For identification A, April 26, 1895. Admitted January 11, 1896," shown witness). This is the original. It came from the Auditor's office. Mr. Cary took it and read it aloud to Mr. Miller, in Mr. Hegeman's hearing and in my hearing. Mr. Cary turned to Mr. Hegeman and asked this question: "Is there anything in these claims that you now present that you were not perfectly conversant with at the time this receipt was taken?" He said there was nothing. He did not make any claim at
905 that time for any extra work than the three items that I have spoken of; not in my presence. He did not make any claim as to anything erroneous in that receipt, or make any objection to any of its statements—he did not within my hearing. Nothing more was said at that time, except that Mr. Cary gave an opinion, and the conference broke up. I remember distinctly the purport of his statement, but what he stated, in exact words, I may not be able to give. As near as I can tell, what he stated was that the claim could not be considered on account of the receipt. Mr. Hegeman, I think, soon afterwards left the office. In the afternoon or evening I met Mr. Hegeman at the hotel—the Plankin-
906 ton House in Milwaukee. I had a conversation with him there. I asked him how it was that he was presenting claims of the nature of those presented, at this late day. He said that Mr. Clark had promised him that he could have what he could get out of them. Mr. Cary is not now living. Mr. Cary had been the principal legal adviser of the Company for many years, since organization.

(Papers handed witness.) Those papers are the monthly estimates during the whole of the progress of the work, beginning with the month of May, 1886, and going on with June, July, August, September, October, November and December, 1886;

January, February, March, April, May, June, July, 907
August, September, October, November and December, 1887, and January, 1888. The last monthly estimate which I made before the final estimate was of January, 1888. I never made up any estimate that was called a total estimate of quantities, as distinguished from the final estimate which has been produced here. I never certified to any. There were no statements made by the engineers at the time his work was finished that were called total estimates, showing the total quantity of the work on each division of the road that were certified to by me. There were none certified to be correct by the Division Engineers and approved formally by the Chief Engineer, and no such thing as a schedule, 908
which came in about the 15th of December, 1887, as the regular, careful, last measurement of all the work. I made no other estimates than these monthly estimates. This last monthly estimate that I made in January, 1888, did not include any statement of the total amount of the work done of each kind. It was made up by taking the contract price for the work completed, and deducting the amount of work that was estimated to be done to complete the work, at the item prices given in Mr. Clark's contract, making an adjustment for the difference between building to Harlem and building to Randolph bridge. These estimates were not made up on the basis of the work actually done, but de- 909
ducted from the whole contract price the estimated quantity of the work not yet completed as near as we could ascertain. Mr. Cary made up that final receipt; it is typewritten.

CROSS-EXAMINATION by Plaintiff's Counsel:

I have been connected with this defendant company since 1863, thirty-three years exclusively connected with it. And for all that time have been its Chief Engineer; occasionally I have had a little expert business, but outside of that, practically, my

910 whole time has been given to this corporation. I had verbal communications with Mr. Hegeman whenever he appeared at my office before the contract was entered into. I had conversations with him and discussions as to matters relating to the work at the time we were drafting the terms of the contract paragraph by paragraph. At this time we had laid out the route of the road, or had it prepared for a larger part of the way. There were something like, I think, 120 miles that might be called located. This 120 miles had been surveyed by a corps of engineers. We had the profiles, and had the surveyors' books of actual measurements.

I think the patent for the splices and bolts of the
911 J. T. Clark pattern was procured some time after this contract was let. I think it is a patented article. I never saw the patent. I know what novelty it covers. It could not claim any patent for the nut lock. I presume that had already been patented by some one else. The patent nut lock which was used on this road was known as the Verona nut lock. Our purchasing agent of the railroad company bought these nut locks. I have seen what we term a Verona nut lock on the Kansas City line. The difference between a nut lock and a washer is that a washer is simply a plain ring not showing any elevation of one part above the other, while a nut lock shows the elevation of one side above the
912 other. There is nothing on that plan that indicates that it is anything but a washer. I suppose they were charged against Clark's account. The advantage of the nut lock is that it prevents the nut from becoming loose through the jarring of a train. Without a nut lock the nut will reverse its motion on the screw-thread, as the incline in pressure is the other way, and naturally untwist. Practically, it has the effect of keeping the nut in its place, preventing it from becoming loose. I do not in my certicate claim any right to pass on the payments to Clark. Mr. Hegeman, at this time I had the talk about the certificate, did ask me to pass on the

question of nut-locks—he brought it up. He claimed extra compensation for the nut-locks at that time. He asked me to pass on it. I told him that in my judgment it was not a proper claim to allow. That I would refer, however, the matter to our legal officer, which I did. That is the reason it is not passed upon in this certificate. I don't recollect that I gave Mr. Hegeman any written notice to come to me before I made up this certificate. I think I did not give Mr. Clark any written notice. He was not there. I can't fix the date prior to March 3, 1888, or if it was on that day, when this final certificate was made up. But I am quite sure that it was a very short time before March 3d. It couldn't have been but a few days before, I think. I presume that it was signed on the day that it bears date. I think Mr. Hegeman was there on the day it was signed, I don't know. Within a few days of that date I am pretty sure he was there. I never showed Mr. Hegeman the identical paper. I did not show him one exactly like it. This appears to be a recapitulation of the whole matter that was gone into. And from it appears to have been deducted the previous estimates, without reference to whether they had been paid or not. I know, as a matter of fact, that there was a great deal more due at that time than $28,000. I don't recollect that I ever handed Mr. Hegeman a copy of this exhibit. I have no recollection of sending it to him. I think I did not give one to Mr. Clark or send one to him. I have no record of it. The final certificate has nothing to do with the running accounts. Those were kept in another department. I did not have anything to do with it. What I mean by the running account is the material sold to Heman Clark, rebates, material taken off his hands, which was kept in the Manager of Construction's department. That which went into the work and was properly included in an estimate showing the amount due to Clark for work done under his contract is in my final estimate. I didn't undertake to pass on any.

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916 thing except what was due him under his contract, except as they appear there by this certificate which I made of the amount and value of the work done by said Clark under the contract. I have not undertaken to go into anything beyond that.

The question of nut-locks was whether the nut-locks should be charged against him as a payment. It had already been charged. The question was whether he should be credited. Whether it should be included in the final estimate as an extra was the question. It was in effect a question of payment, whether the Company should be allowed the charge they had made against him for the nut-locks. It was whether the Railroad should deduct out of the
917 money that was due him what they had paid him for nut-locks. I did not assume to have authority to determine what should be paid or should not be paid him; but in what should be allowed to go to his credit under estimates I claimed to have authority. There were several washouts during the time Mr. Clark was building this road. I believe there is an allowance made him for timber to repair a wash-out during the construction of the road, that was taken before the final estimate was made. There is not anything in this final certificate or any bill for wash-out after that. I do not know whether Mr. Hegeman ever saw this paper, Defendant's Exhibit 34. I never handed it to him. I never showed it
918 to him. I do not know of anybody else that did. I never showed it to Mr. Clark, or handed it to him or sent it to him. I don't know of anybody who did. I have had a statement prepared showing the right of way, when it was secured, by stations, throughout that line. It was taken from the deeds. I don't remember, as Chief Engineer of the road, that there was a great deal of delay in obtaining the right of way near Randolph and Birmingham, formerly Minnaville. There was not a great deal of delay. I don't know that there was trouble about fixing and adjusting the terminal stations at Gault. As between the selection of Gault and Chillicothe,

it was Gault and another station. I spoke about a 919
conversation with Hegeman in 1890, when Mr. Roswell Miller was present. Hegeman made certain claims there. They were all passed on right away there, in my presence and Miller's presence, that day. If that conversation related at that interview can be considered as passed upon, that would be all I know about it. That ended the matter. Mr. Miller did not in my presence ask Mr. Hegeman to put his claims in writing, and say he would refer them to the law department. I presume he did; because I have seen the opinion of Mr. Cary. I was testifying from my recollection of what took place on that special occasion, when I put those words, or the substance of them, in the mouth of Mr. Hege- 920
man, and in my own and others. Mr. Roswell Miller did not in my hearing ask Mr. Hegeman to put it in writing and address it to him, and they would be passed upon afterwards. The counsel of the Company was present and gave his opinion as I said right in Mr. Hegeman's presence. I think it was in February, 1890. I don't recollect anything said about Mr. Hegeman's putting it in writing. I will not say there was not. I did not hear Mr. Miller say, "Well, Mr. Hegeman, you had better put your claim in writing here, and we will have the attorney for the Company pass upon it, just as I told Mr. Clark I would when he signed the receipt." I did not hear any part of it. I recollect 921
Mr. Hegeman saying that he had done considerably more bridging than he contemplated. There was some conversation about the King & Wetherill matter. I recollect nothing of the question of interest on $35,000 that had been kept back for two years spoken of at this time.

This letter now shown me does not refresh my recollection at all. I do not recollect seeing that claim of $35,000 at all or the interest on it.

The letter shown witness was offered and received in evidence, marked **Plaintiff's Ex.**

922 **hibit No. 25**, and was read in evidence as follows:

MILWAUKEE, WIS., Feb. 26, 1890.

ROSWELL MILLER, Esq.:

Pres. C. M. & St. P. R. R. Co., Milwaukee.

Dear Sir:

I beg to present for your consideration the following claims in equity that have grown out of the construction of your Kansas City Extension, namely:

1st. For nut locks furnished, including freight to Ottumwa, Iowa, and putting the locks in place, $10,000. I beg to state that prior to the execution
923 of the contract with Heman Clark and not until track laying was commenced did the question of nut locks come up. They are not referred to in the contract in any way, and the claim is made on the ground that this is an extra. * * *

4th. In addition to these, interest on $35,000 for two years held by you against unadjusted claims growing out of construction.

Respectfully yours,

W. W. HEGEMAN.

I first saw Defendant's Exhibit No. 36 after Mr. Cary had drawn it up. I can't say that it was this very paper; that or a copy of it. It is, as near as I
924 could judge, verbatim. I did not draw it up myself; John W. Cary did. He read it over to me. I think it was read twice. I think it was read to me in the first place, and it was read again in another room, I think in the President's room. Whether it was the President or Mr. Myers or the Auditor I can't state. I took no part at all at composing it at that time. The counsel in 1890 read it or a copy of it; this same counsel who has died, Mr. Cary. It was in the hands of Mr. Cary. I heard him read it to Mr. Hegeman and Mr. Miller in February, 1890. I took no part in getting it signed. After it disappeared from my view it went into the hands of

the counsel of the Company. I had no communi- 925
cation with Mr. Clark or with Mr. Hegeman on the subject of it. I was not in New York at any time in regard to the signature of it at all. I can't tell you now that it was this very one which Mr. Hegeman saw at Milwaukee in 1890; but I can tell from the contents that it is what was read to him. I know from the contents that this matter, I should say in the exact language of this document, was read. I have no doubt of it.

REDIRECT-EXAMINATION by Defendant's Counsel:

I am able to identify this receipt of Mr. Clark's which has been shown to me to-day as the one or a copy of the one that was read to Mr. Hegeman in 926
Mr. Miller's office by Mr. John W. Cary at the time I speak of in 1890, from the fact that the figures stated in there are the figures of the final estimate, the credits are the same, and that comparing it with the running account it appears to cover that also exactly; and the language is that which I remember as being used in the document that was read to him. That document that was read corresponded with the receipt that had been prepared by Mr. Cary at the time of my final estimate.

The extent of the Chicago, Milwaukee and St. Paul Railway system is 6,300 miles, about. About one-half of that has been constructed under my supervision as Chief Engineer; nut-locks were used upon 927
that road, probably three-quarters of that road, at this time in 1886, when this contract was made. The extent of the road in 1886 was, I think, about 5,000 miles. I think at that time about 2,400 miles had been constructed under my supervision. The difference between a washer and a nut-lock is this: A nut-lock is, you might say, a washer that is made of steel, cut and twisted a little. That is a short description. The washer is perfectly flat. The nut-lock is a little thicker than the ordinary wrought iron washer. When screwed up in place one resembles the other. That is when the nut-lock is

928 pressed down by the nut, when the nut is screwed up; in the drawing it will appear the same as a washer. In addition to that drawing we had in the Superintendent's office a full size joint, screwed up, with nut-locks and all on, and I recollect taking Mr. Hegeman down to the Superintendent's office and showing him that joint, with the nut-locks on it. That is, where two rails came together, and the angle-bars on and the bolts through it, with the nut-locks and nuts screwed up. The difference in cost between a nut-lock and an iron washer of the same size, or a steel washer, is a difficult matter to tell. There would be a patent on one, perhaps. There wouldn't be scarely any difference in cost,
929 irrespective of any patent, royalty or charge. The spring of the nut-lock would make it more expensive; but there is not quite the weight of metal in a nut-lock that there would be in a washer. A washer is always larger than the nut in diameter. The nut-lock is always smaller than the nut in diameter. Nut-locks were used on the Marion branch of the road, in the construction of it, that had been built one or two years before this was started. I do not find in Article 6 of the contract any mention of nuts at all.

I construe the contract, in requiring the Clark splice, to carry with it the nut-locks.

I state that I went over with Mr. Hegeman, or
930 Mr. Hegeman went over with me, every item that I have allowed in this final estimate of March 3, 1888, or in the schedules annexed to it, the final schedules. Mr. Hegeman saw the statement of every item which I have added to the contract price or which I have deducted from the contract price in this final certificate. He assented to them in this manner, that when I got through I asked him if that was all he had to present, and he said it was all he had to present, except the question of nut-locks, except that he asked me to have him credited with the amount of nut locks which had already been charged to him. He disputed my ruling on the matter of

nut-locks, and I told him I would get the opinion of our solicitor. I gave him my own opinion about it. I said that I saw Mr. Hegeman after I received his letter of March 3, 1890, in regard to his claim for some timber used in a washout near Chillicothe. I either saw him or wrote him; I can't tell which. I told him that I was unable to find any of that timber that he claimed to have left along the line after the close of his work. We did find the lumber that we bought. That is the sum and substance of what I told him, that I was unable to find any timber that he claimed to have left, not bought by the company, along the line, at the close of the contract. I never told him we had used any. I told him that we had not got any; that we had not found that there was any. I had not found any, and that was what I either wrote or told him. I did not personally go out on the line of the road or to the Chillicothe yard and examine as to this timber. I know nothing about it of my own knowledge.

RECROSS-EXAMINATION:

I did not show another plan than the one here about the nut locks to Mr. Hegeman when I went to the superintendent's office with him. I showed him the splice with the rails in it, pieces of rails in it, fully bolted up; it had the Verona nut locks on it screwed up tight. You could see it was the Verona nut lock. I can't say that the Verona nut lock was mentioned, or that any nut lock was mentioned. I think there were two pairs of splices that were shown to him on my table upstairs. I remember that I went down to Superintendent Clark's office with Mr. Hegeman. His attention was called to the top joint, but not especially to the nut locks, not especially to a bolt or a nut. The break on the nut lock runs through. You can see it from the outside.

Q. It runs right through the rail, does it not? A. No; it is just like a washer. It was put there on a full sized rail in Superintendent Clark's office; it was

934 a full sized rail in section. Probably three or four feet at each end of the rail. There were two rails. I don't recollect the nut-lock being spoken of.

REDIRECT-EXAMINATION:

A nut lock would be shown on the rail and the bolt, by the fact that it had a split in it; that would be evidence of what it was. A washer does not have any split in it, it goes on over the bolt.

FRANCIS W. KIMBALL, being duly sworn in behalf of defendant, testified as follows:

I reside at Austin, Minnesota. My occupation was
935 that of an engineer and contractor. I was connected with the Chicago, Milwaukee and St. Paul Railway in 1885, 1886, 1887 and 1888; but I have not been connected with it under salary since April 1, 1889. In 1885 and the spring of 1886 to about April 1st, I was Assistant Chief Engineer. The balance of 1886 and 1887 and the spring of 1888, I was Manager of Construction of the Kansas City Line. I know about the building of the Kansas City Line of that road from Ottumwa, Iowa, to Randolph Bluff, Missouri. I was the engineer in charge of the parties in the field locating that line. I first traversed the country to determine the general route to be taken.

The Milwaukee and St. Paul Road then had a
936 road built to Ottumwa, a branch from the Council Bluffs Line at Marion, Iowa. It was called the Marion Branch, or Ottumwa Extension. This projected road was an extension of that from Ottumwa to Kansas City. I met Mr. William W. Hegeman about that work late in the fall of 1885 or the early winter of 1886. He came to Kansas City for the purpose of going over and investigating the route of the road. That is what he told me; and we arranged as to the method of going over the route. He told me that he represented Heman Clark, and that Mr. Clark was proposing to make a proposition to build the road. He expressed a desire to examine the line,

and I put myself at his service to go over the line in detail, as far as he wished, and gave him what information I had in the way of profiles, some of which I had with me at the time. The determination of the whole line had not been absolutely made at that time, as I remember it. I think we first discussed the character of the contract pretty thoroughly at the hotel of Kansas City, the proposition of its being let in a lump sum, and the uncertainty that there was in such matters. It was Mr. Hegeman who spoke about its being let for a lump sum. He told me that that was the proposition, to bid on it for a lump sum. I showed him the profiles that I then had. We had a man computing quantities at Milwaukee. I introduced him to that man, and told him to give Mr. Hegeman all information which he might be able to, and to give him access to any and all records, books, profiles, &c. 937 938

Bids were made and turned over to me for analysis; as there were several parties bidding they were made in several forms. I submitted the results to Mr. Miller, the general manager, and later he decided to reject all bids and ask for new bids. Mr. Clark was one of those bidders. This was several weeks after we had been over the line of the road. I had a conversation with Mr. Clark about his proposed bid. I asked him, and all others bidding, to state what they would complete for based on the time of June 1, 1887, and how much less if given until August 1st to finish. I asked them to bid that way in a lump sum. There was no public advertisement. I told Clark this, and everybody else, separately. There were three bidders. I asked Mr. Clark and them all to bid based on completion June 1st, and how much less they would do it for if given until August 1, 1887. I had a subsequent interview with Mr. Clark about the bid which he had made, after the second bid at the Gilsey House, New York City. Mr. Clark, Mr. Miller and myself met there, and Mr. Miller told Mr. Clark that his bid was too high, 939

940 but they had made up their minds to offer him $19,500 a mile. Mr. Clark hesitated a moment. I explained to Mr. Clark what the difference would be in the sum total. I told him the exact difference it showed computed some $35,000, $36,000 or $37,000 difference in the total sum; that it would reduce his bid some $36,000 or $37,000; $19,500 a mile would. Nothing was said about dates that I remember. Mr. Clark said he would accept it. I left immediately. I was conversant with the preparation of the contract. I aided Mr. Whittemore, whatever I might be able to, in formulating the different articles and discussion as to what was proper and what they should cover. Mr. Hegeman was there part of the
941 time at least, possibly all, in Mr. Whittemore's office in Milwaukee. We went over and discussed all the points. After the contract was drawn up I saw it or a copy of it before it was executed. It was a typewritten paper. I don't remember that I ever saw it after it was executed. I remember about a letter that was written by Mr. Milier to Mr. Clark on or about the 19th of March, 1886 (handing paper to witness). I heard one dictated of which I think this is the exact wording. Some days later Mr. Miller handed me a Western Union telegram. As I remember, the wording of the telegram was, "All right. Will complete by June first or forfeit the $40,000." I remember that distinctly. The name
942 attached was Heman Clark. It was addressed to Roswell Miller at Milwaukee. It was at Milwaukee that I saw it, in Mr. Miller's office. I saw the telegram again once. That was, I think, at the time when Mr. Cary was about to draw up the final receipt. After the contract was executed, I went immediately over the work to re locate some of the line where I though it could be bettered. I had charge of the surveyors up to I think April 1st. My part of the work was to superintend the construction. I had nothing to do with the engineers except indirectly. The work progressed very slowly. I couldn't tell in exact numbers the amount of force

that the contractor had at work upon the road. It was 943
small for the amount of work to be done. I had communications or conversations with Mr. Hegeman about the force at work on the road. I think I had both. I know I wrote him urging him to put on more force in some of the heavier work. In many parts there was considerable time elapsed before force was put on at different parts of the work. Mr. Hegeman explained that he was partially handicapped by Mr. Clark promising parties heavy work on the other end, and also promising them heavy work on the lower end. That is one reason why he said he was not getting work done on the lower end, when I made complaint. It was also hard to get teams, and men were scarce. I remember their shipping 944
material around to Gault and beginning work there. They worked from Gault both ways, in grading and track laying.

On July 30, 1886, I sent the letter now shown me to Mr. Hegeman.

The letter was offered and received in evidence and marked **Defendant's Exhibit No. 46**, and read in evidence as follows:

"JULY 30, 1886.

W. W. HEGEMAN, Esq.,
Ottumwa, Iowa.

DEAR SIR:

945
Yours of July 26th I find on my desk. The matters of right of way which you spoke of have all been attended to I think. I was talking with our right of way agent in that vicinity a few days ago, and I understand all parties have agreed to allow your contractors to go on. As far as questions of law are concerned, you have been empowered to go on there for some time. It was only because your contractors were afraid of some of the loud mouths of those Missouri mossbacks who threatened to shoot if they went on. The condemnation proceedings have been perfected and the money deposited

946 and nothing but their fear of Missouri shotguns prevented their entering upon the work.

Yours truly, F. W. KIMBALL."

There were some delays near Randolph Bluff, owing to the definite location of the bridge not being determined; and there was quite a long delay in regard to the grade crossing of the Hannibal and St. Jo road at Minnaville. That was settled at the time that the track got down there. All but about a quarter of a mile of the grading was finished some time during May, 1887. The track laying got down there about the 1st of November, 1887. At Randolph Bluff the track was laid I think some time in Octo-
947 ber. They shipped material and laid from Minnaville to Randolph Bluff. But the track from the north, to come down to join with that, joined about the 1st of November. This delay at Minnaville did not delay in the final completion of the work. A considerable time elapsed after the crossing was arranged for and the grading done, before they laid their track from the north. I mean by that to say that they were not ready – that we were ready before they were, even though we were delayed. If there had been no delay at all in acquiring the right of way there, they would not have been delayed in doing their work. They could not have finished their work
948 there any sooner. They might have completed the grading sooner, but not the final completion of the work, for they were not ready to lay from the north over it; I mean to say that if there had been no delay in acquiring the right of way at Minnaville, they would have been as much behind as they proved to be. Just as much. It didn't delay the final completion of the work; not a moment. It did delay the grading at that particular point for a time, but even when they graded it they were not ready to lay track. The grading had been done on both sides. There was a railroad crossing. The track was laid early in the winter from Gault south nearly to

Chillicothe, and then I think it was taken up again in April, and they were from April to November, 1887, in getting to Minnaville. I remember difficulties about the condition of the track. Early in the spring of 1887, the track which had been laid during the winter became almost impassable. We had considerable controversy about it. I notified Mr. Hegeman about its condition.

I wrote the letter now shown to me, dated February 4, 1887, to Mr. Hegeman.

The letter was offered and received in evidence, marked **Defendant's Exhibit No. 54** and read in evidence as follows:

FEBRUARY 4TH, 1887.

Mr. W. W. HEGEMAN,
Ottumwa, Iowa.

Dear Sir:

We have had no track reports for some while from Ottumwa south, and am I not aware whether you are laying any track or not. The last that we heard they were laid up for some bridges at about 1,634.

I do not know what the prospect is ahead, because I do not know in what shape your bridges may be. It does not seem as though bridges should hinder the track laying if the bridge man keep on a proper force.

It is very possible that for a month or six weeks, when the frost is going out of the ground, that it may not be possible for us to allow you to run over the unsurfaced track; hence there is a possibility of at least one month's delay in your track laying.

I write this to urge you to make all necessary exertions to keep the bridges so the track can be laid continuously without delay as long as the ground is frozen.

I do not think we can afford to take the risk of the steel being injured by running over it while the

952 ground is soft and the grade in the condition that much of it is.

Yours truly,

F. W. KIMBALL."

(Paper handed witness.) I received this letter from Mr. Hegeman. It is marked as being received September 23, 1886.

Said letter is offered in evidence and marked "**Defendant's Exhibit No. 55**, January 30, 1896," and is as follows:

"OTTUMWA, IOWA, September 22, 1886.

953 F. W. KIMBALL, Esq.,
Mgr. Construction,
Milwaukee, Wis.

Dear Sir:

So many difficulties have been met with on the east end of the line that it seems hardly possible to reach Kansas City by June 1st, 1887, if we lay all of the track from this end, which, as I understand it, it is the desire of the Company that we should. I think we could by shipping around material to Gault, and laying track from there as well as from this end of the line, reach Kansas City without difficulty at the time stipulated in the contract, provided you have no objection to our so doing. Will you kindly
954 advise me what you think of the plan, also if it is your intention to have a transfer track at the crossing of the Q. M. & P. Road near Gault.

Respectfully yours,

W. W. HEGEMAN."

I sent this letter now shown me, dated September 30, 1886, to Mr. Hegeman.

The letter was offered and received in evidence, marked **Defendant's Exhibit No. 56**, and was read in evidence as follows:

"SEPT. 30th, 1886. 95

W. W. HEGEMAN, Esq.,
Ottumwa, Iowa.

Dear Sir:

We are entirely willing that you should lay track from Gault, and hope that you may do so if it will enable you to reach Kansas City on time. In regard to the transfer at the crossing of the Q. M. & P. road near Gault, the angle is such that it is a very slight matter to put in, and the Q. M. & P. will offer no objections. I presume that we can get you cheaper freight by the way of our road, the Wabash and the Q. M. & P. than you would be able to get. If you decide to do this we should like to have you decide soon, on account of the arranging for the 95
rolling of the steel, as we have a certain amount rolled of the 60 lb., but are having it largely rolled now of the 56 lb., and we should desire to know how soon you will want it and how rapidly you will lay it, as we shall want more to complete our Dakota Lines.

F. W. KIMBALL."

At this Minnaville crossing we crossed the Hannibal and St. Jo. Where we first expected to cross was not satisfactory to them, and after a matter of some talk and consideration it was agreed to cross them further down, and in the meantime we should take their track from where we proposed to cross them down to this lower crossing further west. 957
Their objection was because where we attempted to cross them was near a heavy curve, with a sharp point of land, and they claimed that in stopping for our crossing they couldn't always see beyond that, and consequently they wanted it shifted further down, a quarter of a mile further to the west, where it was all open ground. The result was that finally we took their track and built them a new one, and made the crossing down nearly a quarter of a mile below nearer Randolph bridge. I wrote this letter to Mr. Hegeman, a copy of which is found on page

958 657 of my letter book, on February 3, 1887. It was sent to him.

Said letter was offered in evidence, received without objection and marked "**Defendant's Exhibit No. 57, February 3, 1896**," and is as follows:

FEBRUARY 3, 1887.

Mr. W. W. HEGEMAN,
Ottumwa, Iowa.

Dear Sir:

The Minnaville crossing matter has now been definitely settled, and Mr. Appleton will have the line staked out, so that Mr. Dorwin can go at it at
959 any time in the Spring.

Yours truly,
F. W. KIMBALL."

Nut locks were used in the construction of this road. They had been used on the Milwaukee and St. Paul road before this time, on all divisions that I ever had been on. Not this same nut lock on all divisions; there had been a change; we used the Verona nut lock there. They were used in connection with the splices that were put on. It was the J. T. Clark splices that we used. The nut locks were used with those splices. The splices could not be effectively used without nut locks, not with the
960 best results. They could be used, but not with the best results. This nut lock was, you might term it, one full circle of a spiral spring, the ends being sprung apart. A washer would be a solid body all around, with a hole punched for the bolt. The washer would be much greater in diameter, but ordinarily somewhat thinner transversely than the nut lock. I could tell the difference between a washer and a nut lock when it was on. The washer as a rule, and you might say always, is larger than the diameter of the nut, while this nut lock is much smaller than the diameter of the nut. I remember a section

of rail, with a specimen of the J. T. Clarke splice, being set up in Mr. Clarke's office. I think it was there at the time Mr. Hegeman was out there. I know there were several places on the road where, after the right of way was secured and the line had been surveyed and staked out, the contractor did not go on with the work for some time, on the lower part of the work. There must have been some four or five months after it was surveyed and staked out. I remember the time when Mr. Hegeman came to Milwaukee, after the work was completed, or about the time the work was completed, when the accounts were adjusted. The track laying was completed about the first of November, 1887, but there were many details of work which were not finished until well into the winter. I think some, a very little, was not even finished until the latter part of February, 1888. Mr. Hegeman came to Milwaukee the very last days of February or the first days of March, 1888, When Mr. Hegeman came there we went through a final adjustment of all accounts presented. We took them up in detail, and he was given credit for various matters which came up at that time—the accounts which he presented. Many of those credits were credits which had been given him during the course of the construction of the work; credits for the monthly estimates; and the adjustment of many of these items had been made previously by correspondence.

This paper now shown to me contains a list of all the credits given during the progress of the work and in March, both. It gives a list of all the credits given Mr. Clark, and all the charges, credit and debtor, up to that time. I mean by that that it includes the way it was settled with Mr. Hegeman, as I understand it. I have seen these monthly estimates that were produced here on Mr. Whittemore's examination, twenty-one in number; those went through my office. Most of them are formally certified by me; some of them having merely my initials

964 on them. I wouldn't say that this list of debits was prepared while Mr. Hegeman and I were settling. It is my impression that it was. I couldn't swear that it was. The aggregate amount of the monthly estimates with which Mr. Clark was credited is $3,895,798.79. That is the amount of the monthly estimates running from May 15, 1886, to March 3, 1888. I mean all the estimates on the work. Other credits were made to Mr. Clark. There were a series of vouchers, aggregating in the whole $34,598.90. Among the items I find an item for which Mr. Clark was given credit, included in this last sum of $34,598.90, of $19,878.56.

965 (Paper handed witness.) This is the voucher for that sum. That is the voucher that includes the credit for lumber taken off of Mr. Clark's hands at the time of the completion of the contract. In the voucher for $19,878.56 there was 9,677 oak switch ties and head blocks, which would be oak lumber; by switch ties I mean what we used in putting in frogs where we use sawed ties; and there was 88,736 feet of pine lumber. That was lumber left over in building their pile and truss bridges that we took off their hands. The pine lumber was all at Chillicothe. The oak lumber was divided between Chillicothe and Ottumwa—a little in each place. That in Chillicothe was in the Chillicothe yard. There

966 was not any other lumber left on hand after the completion of the contract except this, for which Mr. Clark was given credit, that I know of. I only know that we took everything which they presented to us. I understood it was all that was left. In a previous conversation it was agreed that he was to bring in all that was left, and Mr. Hegeman's men and our engineer were to check it over, which we did, and we took their reports. As I remember, he brought in everything that he had, and we accepted it all. I can't remember that he said that it was all that he had, in exactly those

words. He agreed that he would bring in all that 967
he had. And then he produced those bills as evidence of what had been checked over, by both sides. We took everything else off their hands that they had on hand at the time the contract was completed. There were some tools that possibly we did not; but we did take various tools, track and things of that sort—track material. They had tools that we did not take off their hands. The other items with which he was credited making up this sum of $34,598.90, were for other kinds of material—switch stands, frogs and various things of that kind. Various rebates for fares and for freight. I went over all these items at this time of adjusting the accounts. I also went over with Mr. Hegeman and 968
Mr. Whittemore the items that entered into the final certificate. All the items that were deducted from the contract price, and all that were added to it. None of the deductions that were made objected to by Mr. Hegeman. There was a claim presented that we did not pay for, which he objected to. I mean the matter of nut locks. That was deducted. That was one that he claimed should be added. Mr. Hegeman did not make any claim for anything else that should be credited or added than what was done at that time, nothing except nut locks.

ROSWELL MILLER, being duly sworn in behalf of 969
defendant, testified as follows:

DIRECT-EXAMINATION by Defendant's Counsel:

I am president of the Chicago, Milwaukee and St. Paul Railway Company, and have been president of that road since April 25, 1888. I was connected with the road before that as General Manager. I was General Manager from April, 1885, to April, 1888, when I was made President. Prior to that I was Assistant General Manager. I was General Manager during the years 1886, 1887 and until April, 1888. I remember the making of the con-

970 tract with Mr. Heman Clark for the construction of what was known as the Kansas City Extension of the Milwaukee and St. Paul Railway Company, extending from Ottumwa, Iowa, to the Missouri River. It was first intended to go to Harlem, and afterwards changed to what was known as the Randolph Bridge. I had interviews with Mr. Clark or Mr. William W. Hegeman in regard to the contract for that work, before the making of the contract. The specific interviews I remember were, I should say two interviews with Mr. Clark, one at our office in New York, either the day before or on the day of the agreement to make contract with Mr. Clark. I do not mean the day of the sign-
971 ing—the day of the verbal agreement that preceded the signing, and the second interview was at the Gilsey House, at the time when Mr. Clark was informed that the contract would be made with him upon terms which had been discussed at that interview. My impression is that Mr. Clark had submitted a written bid. It was submitted to the company, but it came into my hands. I have not got it. I don't know what became of it. It has disappeared. To the best of my recollection my interview with Mr. Clark at the office of the company covered nothing except the matter of submission of the bid; general talk to a very limited extent tending to the question as to when Mr. Clark would
972 meet me and submit his bid. That was at the office of the company. Mr. Wadsworth was not present at the time of my interview with Mr. Clark. That was before I received the bid. I received the bid either the same night or the next day at the Gilsey House. My recollection of it is that the bid in terms agreed to construct the line from Ottumwa to the river for the sum of $3,990,-000—I think that is the sum—completing the same June 1st. The completion was to be the following year; if completed June 1st $3,990,000; if completed August 1st it was to be for $3,950,000, $40,000 less. There were those two separate amounts

I have stated; $3,990,000, if June 1st; $3,950,000 if August 1st. That was handed to me at the Gilsey House in New York. We had a very short conversation. I made Mr. Clark a counter proposition. I proposed to him that we would make the contract with him for the construction of the road for $19,500 per mile, the road to be completed by the 1st of June. That if he took until August 1st to complete the road there should be deducted from that sum $40,000. Mr. Clark accepted the proposition. This contract was afterwards prepared.

(Paper shown witness). This is the copy that was signed by Mr. Clark now shown to me. It was executed by me in duplicate in Milwaukee. At the time it was executed by me the amount of the consideration stated in it was $3,914,600. Then I sent it to New York, to our office in New York. I know how the consideration came to be changed from $3,914,600 to $3,954,600. Mr. Hegeman or Mr. Clark, don't know which, I think Mr. Hegeman, represented to our office in New York--I got a telegram from Mr. Hegeman. I don't know where it is; I have not the original. I have not got a copy of that telegram. It is gone with the file that contained the other papers. I replied to that telegram. I have a copy of it.

Said copy telegram is offered in evidence, received without objection and marked "**Defendant's Exhibit No. 59, February 8, 1896,**" and is as follows:

"MILWAUKEE, March 12, 1886.

W. W. HEGEMAN,
Yonkers, N. Y.

The contract should be at the rate of Nineteen thousand five hundred dollars ($19,500) per mile. You can correct to this amount and execute in New York.

ROSWELL MILLER."

I afterwards received the contract as it had been executed in New York, this one that has been pro-

976 duced, that was executed by Mr. Clark. I then had a further communication with Mr. Clark in regard to it. I wrote this letter to Mr. Clark, of which a copy appears on page 578 of my letter book. It was signed by me. It is dated March 19, 1886. It was sent to Mr. Clark.

Said copy letter was offered in evidence and was marked, at page 578 of letter book, "**Defendant's Exhibit No. 60, February, 8, 1896,**" and is as follows:

"MARCH 19th, 1886.

HEMAN CLARK, Esq.,
2066 Fifth Ave., New York:

977 Dear Sir:

I think there is some misunderstanding as to the consideration to be paid you. When Mr. Hegeman's dispatch arrived here the other day, Mr. Kimball was absent, and I could not lay my hands on the proposition you made, dated January 26th. I telegraphed, in reply, that the consideration was to be $19,500 per mile, understanding the contract to require completion June 1st, 1887. I find, however, that the contract was made for completion August 1st, and therefore the consideration should be $3,914,600, instead of $3,954,600. You will readily see this from the fact that your written bid of Jan. 26th was $3,990,000, June 1st, $3,950,000,
978 August 1st, while the contract as signed was $3,954,000, or $4,000 more than you offered to do the work for. The agreement was $19,500 per mile completed June 1st, $40,000 off if allowed to August 1st. Yours truly,

ROSWELL MILLER,
Genl. Manager."

I also had a further communication with Mr. Clark. I sent him a telegram on April 1, 1886. I have a copy of it here.

Said copy telegram was offered in evidence and marked "**Defendant's Exhibit No. 61, February 8, 1896**," and is as follows:

"MILWAUKEE, April 1, 1886.

HEMAN CLARK,
2066 Fifth Ave., New York:

Have you heard from Hegeman in regard to error in contract? We are perfectly willing to let the compensation stand as it is, completion to be June 1st, and if at any time you desire till August 1st you can have the additional two months, the compensation to be reduced Forty thousand dollars ($40,000), as stated in your proposition, upon communicating the same to me in writing.

ROSWELL MILLER."

That was signed by me. I had a reply to that. I have not got it. I do not know where it is. It is lost with the file. I last saw the telegram that I am now speaking about, which I received from Mr. Clark, at the time when the matter was submitted to Mr. Cary to draw papers in final settlement; the final receipt, I mean. I know the telegram was from Mr. Clark, signed by Mr. Clark. The name Heman Clark was on the bottom of the telegram. Mr. Clark's telegram was, in substance — I can't give the precise words, but I will give the substance as near the words as possible: "Your understanding correct. We will forfeit $40,000 if road not completed June 1st." Nothing was done on the contract, nor work commenced, before I received this telegram. I do not know the date when the work was commenced. I did not give any directions for the work to be proceeded with until I received that telegram. What I know as to the use of nut-locks in the construction of a railroad is that we required the use of nut-locks on all our work, both renewal and construction. It is necessary in order to make a good track. I remember the time when Mr. Hegeman came to me in 1890 about the question

982 of nut locks. I don't remember the date. He made a claim that we should allow him for the expense Mr. Clark had been put to in putting in nut locks; that they were not required by the contract. That was his claim. I told him the contract required in general terms that the road should be built in a substantial and workmanlike manner; that in order to build the road in this substantial manner it was as necessary to use nut-locks as it was to use bolts; that there was a good many things that were necessary to use which were not named specifically in the contract, and that this was one of them. I never told him that he ought to be paid for them. I never told him that they were not included in the contract, and that
983 if he had come to me with them I would have allowed them. He did come to me with them, and I didn't allow them. I do not recall at this time in 1890 Mr. Hegeman made to me any other specific claims. I know there was some question up about unsettled claims of King & Wetherill, but the details of them I did not take up. Neither Mr. Clark or Mr. Hegeman ever at any time after this receipt of March 9, 1888, was signed, raised any question with me about the deduction of $40,000 as penalty for non-completion of the road. Never at any time before this suit was commenced, nor did they ever raise any question about any other matter stated in that receipt. I did not have anything to do with the
984 making up of the receipt. Mr. Cary made up the receipt. All I had to do was to furnish him with the papers—the papers appertaining to the contract. I furnished him with those telegrams—everything. I knew of the sum of $40,000 being retained to meet claims. I can't say that Mr. Hegeman was absolutely present at the time when we computed the amount that was necessary to make us safe against these unadjusted claims. I saw this receipt that was produced here, before it was executed. I sent it to New York. It was signed in New York. I was not present. My recollection is that it was sent to New York in re-

sponse to instructions from Mr. Clark. I did not present it to Mr. Clark.

CROSS-EXAMINATION by Mr. Kellogg, Plaintiff's Counsel:

I can't remember when I had the first interview with Mr. Clark in regard to the contract. I remember nothing about any interview previous to the time when I was on here and the contract was closed. That was, I think, in January, 1886. It was a short time before the date of the contract. These two conversations that I had prior to the making of the contract were had here in New York, during the same visit. I was here I should say a week. Mr. Julius Wadsworth had charge of the affairs of the Company in New York. He was vice-president. Mr. Alexander Mitchell was president. His office was in Milwaukee The vice-president's office was in New York. Mr. Wadsworth represented to me that he talked to Mr. Clark about the contract. I did not understand that negotiations between Mr. Clark and the Company had been conducted to a considerable extent by Mr. Wadsworth, not at all. I understood that Mr. Wadsworth and Mr. Clark had been talking about the matter. I was here at the same time that Mr. Kimball was here. I was not present at any interviews between Mr. Wadsworth and Mr. Clark. At this time I was the General Manager. I did not examine this contract before I sent it on to New York, not in detail. I thought I knew what was in it; I often sign those contracts that are made out by my subordinates whom I have confidence in which I don't read over. I am governed solely by the character of the men who draw the paper. My best recollection is that I did not read it over, because there is an error in it that I would have discovered, and that error was $40,000; the difference between those two amounts, and the date of completion. I had some correspondence with our office in New York, before the figures were changed in that. There was something from New

988 York, either from Mr. Hegeman, or Mr. Dumont, who was second vice-president of our Company. I have not any copy of the telegram in answer to the letter of March 19, 1886. I never took any copy. It was not received the same day that I wrote the letter of March 19th. It was after the first of April. The telegram I received was in answer to my telegram to him, which, I believe, if I recollect right, was dated the 1st of April. It is evident I received no answer to the letter. Therefore I telegraphed him, and then I got that answer. I can't give the exact words. The wording, as near as I can remember it now, was: "Your understanding is correct. I will for-
989 feit $40,000 if work not completed June 1st." That is the substance of it. I have given the best I can. I will not testify that the words, "all right," were not in it. They might have been in there. I would not swear they were not. I told Mr. Kimball that the work could go ahead. I didn't give Mr. Clark or Mr. Hegeman any directions themselves. No written notice to commence the work—not to my recollection. They didn't ask me to commence the work before I allowed them to. I don't remember that we were troubled about rights of way there at the beginning of the work. I recollect we had some little difficulty before we could get through in regard to a crossing. There was not any absence of
990 rights of way at the beginning of this work—not of my own knowledge. I have heard of alleged delays in rights of way at the Minnaville crossing—the C., B. & Q. crossing—I know of that personally, because I had some talks with the C., B. & Q. in regard to it. I do not know exactly how long a time negotiations were pending in regard to it; I should say several months.

I didn't have anything to do with the preparation of this receipt, except to furnish the contract and other papers. It was drawn in Mr. Cary's office. I didn't see Mr. Clark about it at all. I am sure I did not come to New York then about it. I did not

come to New York on that subject. I sent the telegram now shown me to Heman Clark. 991

Telegram was offered and received in evidence, marked **Plaintiff's Exhibit No. 28,** and read in evidence as follows:

"MILWAUKEE, Wis., Feb. 23, 1888.

HEMAN CLARK,
40 Wall Street, New York.

Is Mr. Hegeman fully authorized by you to make final settlement on your contract with this company for construction of Kansas City line?

ROSWELL MILLER."

I cannot produce the answer that Mr. Clark sent to that. I have not got it. It is not in the record room. That was in the bunch that was lost. It was after receiving this telegram that I sent the receipt on to New York. The letter that contained the receipt was, to the best of my recollection, addressed to Mr. Bond, who was then and is now Vice-President of the R. R. Co. I took no part in making it up, except to furnish the papers, the file of papers, and that is the file that is lost. We moved our office from Chicago to Milwaukee five years ago last April. That was in 1890. 992

CROSS-EXAMINATION of F. W. Kimball by Plaintiff's Counsel: 993

I say, as Manager of Construction, that we did not expose the contractor, Mr. Clark, to any more delays in the performance of his work than the ordinary delays which would arise. I suppose there were delays caused by the Railroad Company.

I sent the telegram and letters now shown to me.

Telegram of January 24, 1897, offered and received in evidence and marked **Plaintiff's Exhibit No. 29**, and read in evidence as follows:

994 MILWAUKEE, January 24, 1887.

W. W. HEGEMAN, Ottumwa.

Owing to the breaking of the rolling mills we will not be able to get any North Chicago steel for quite a little while. If the North Chicago steel is exhausted before any more arrives, we will have to fill in the gap with Pennsylvania steel.

F. W. KIMBALL.

Also letter of January 14, 1887, was offered and read in evidence marked **Plaintiff's Exhibit No. 30**, and read in evidence as follows:

MILWAUKEE, January 14th, 1887.

Mr. W. W. HEGEMAN,

995 Ottumwa, Iowa.

Dear Sir:

During February will send you 5,000 tons of steel from Scranton mill. This I desire kept entirely separate from the other, that it can be laid consecutively whenever laid.

Yours truly,

F. W. KIMBALL.

Also letter of February 5, 1887, was offered and received in evidence and marked **Plaintiff's Exhibit No. 31**, and read in evidence as follows:

MILWAUKEE, February 5th, 1887.

Mr. W. W. HEGEMAN,

996 Ottumwa, Iowa.

Dear Sir:

Referring to yours of February 3rd about steel would say that the first steel that we can now get is the Scranton steel. If you don't close the gap before March, you may be able to lay with North Chicago steel. After the Scranton steel will come the North Chicago.

We have to take it as our contracts run and we have no contract for North Chicago delivery before March.

Yours truly,

F. W. KIMBALL.

Also letter of March 11, 1887, was offered and received in evidence marked **Plaintiff's Exhibit No. 32** and read in evidence as follows: 997

MILWAUKEE, March 11th, 1887.

Mr. W. W. HEGEMAN,
Ottumwa, Iowa.

Dear Sir:

Your telegram in reference to steel received.

I am surprised that the Scranton people loaded the steel that way. They loaded on our cars direct, we sending them there.

I called Mr. Clark's attention to it, and he says the steel is now all shipped and cannot be remedied. 998
It is strange that people who have been in the habit of shipping steel so long as they have should have shipped it that way.

Yours truly,
F. W. KIMBALL, M. C.
C. R. J.

I think the trouble referred to was shipping on foreign cars.

Q. The cars were not taken to where they could be used on construction. They were off the line, were they not? A. All the steel came from off the line, of course. 999

Q. They were off the line where they were to be used. They were not shipped to the place where they were needed by the contractor? A. I can't remember at all as to what the trouble was in reference to that matter.

I remember getting this letter from Hegeman, dated February 1, 1887, in regard to the Hannibal crossing near Minnaville.

Said letter is offered in evidence and marked "**Plaintiff's Exhibit No. 33, February 1, 1896,**" and is as follows:

1000 " FEBRUARY 1st, 1887,

MR. F. W. KIMBALL,
M'gr. Construction,
Milwaukee, Wis.

Dear Sir:

W. E. Dorwin & Co. have served us with notice that if the Hannibal crossing near Minnaville is not settled so they can do their work in the favorable time of the year, or in short if the delay in procuring the right of way forces them to do the work in wet weather that the added cost of doing the work will be charged to us on force account.

Cannot the right of way be procured at this point, so that in case a favorable opportunity offers we can
1001 have him get at that work and finish it before the spring rain comes on.

Respectfully yours,
W. W. HEGEMAN."

Then I telegraphed back February 3, 1897, Defendant's Exhibit 57. I think it was true. I think the arrangement had been made with the company, but there was some delay in getting the maps changed and certified to. That is my remembrance. I don't remember that there was a considerable piece of the line immediately west of the Hannibal crossing, where I found that the right of way was not settled as late as February, 1887. I don't know
1002 that Mr. Dorwin threw up his work there because he couldn't get the crossing. I know he didn't complete the work. He got his other work completed. We were not ready to have him go across there at the time he left. I don't remember the date now. I know there was some delay there. I think they did not actually make this crossing until November, 1887, with the track. It was about the last thing that was done in track laying; possibly, the very last. I think that the right of way at the place they did cross over was obtained or settled before October 31st—I don't remember. My impression is that the final arrangement for right of

way was completed in May. I am not certain about 1004
it. I can't tell you when I did, if at all, direct Mr. Hegeman to go across there. I think we gave him permission to go across there before the last of October or the first of November. I won't say positively. As I remember it, we didn't cross at the same place we first intended to. I don't know that they were busy obtaining rights of way on this line as late as September, 1887. I knew considerably about it at the time. I can't remember it in detail. I will not swear that they were not getting rights of way as late as September, 1887, but I think not. I remember writing a letter urging Mr. Hegeman to lay all the track he could before it thawed. When the Spring came on we stopped him going on with his 1004
work until the track was fixed up so that it was safe. That was to save the steel and for safety to the life and limbs of the men. I don't remember how long he was stopped. My impression is that it was a week or two. I would not say it was not a month. It was not possible for Mr. Hegeman to go on with his work at Chillicothe until the rights of way were procured. I think the decision was made and everything arranged the latter part of August or the first of September, 1887. The decision was then made as to where the division terminal was to be and where these sidetracks were to go in. I know it is more expensive to jump about from one piece of work to the other; doing the work piecemeal is 1005
very much more expensive and it takes longer time to do it. This work was right through the Jesse James country. I heard in one instance that people came out with shot guns to keep the railroad people from going through the land. I understood that by fear they were prevented from going on with the work by people owning the land. The railroad company did not send out any force to keep the contractors in possession. I know that the work had been suspended at Chillicothe by order of the engineer in July, 1886.

1006 Letter of July 19, 1886, was offered and received in evidence and marked **Plaintiff's Exhibit No. 38**, and read in evidence as follows:

JULY 19TH.

D. J. WHITTEMORE,
Chief Engineer.

Dear Sir:

I have ordered work suspended on the 30 feet span for Wabash crossing at Chillicothe as you requested in your letter of 16th inst.

Respectfully yours,
W. W. HEGEMAN.

I know that the work was stopped by Mr. Whitte-
1007 more at Randolph Bluff early in the season. I couldn't say definitely as to date. Stopped as to the undetermined question of the bridge and the approach. My impression is that they did not get possession there until some time in August. I think they entered on the work in April or May, that contractor.

Q. When did you reach this Randolph Bluff? A. I would have to be allowed to explain that a little. Dorwin & Co. had a contract covering four or five miles there, and while there was one certain place they would like to have entered on before, it did not shut them out entirely from doing the other work on the contract. It did make a delay at that point,
1008 as they could not enter at that point for two or three months, possibly even four; I can't remember now.

Q. Then you mean to say this, that in the ordinary course of their work going straight along, if they had gone right straight across that bridge, they would have reached it probably in April or May, and they were not allowed to do the work? A. They worked a steam shovel there, and I don't remember the steam shovel was laid off. They had to work at some disadvantage, I remember, but I don't remember it was laid off.

On June 3, 1886, I received this letter from Mr.

Hegeman now shown me in regard to right of way 1009
at Liberty.

Said letter was offered and received in evidence and marked **Plaintiff's Exhibit No. 40**, and read in evidence as follows:

OTTUMWA, IOWA, June 3rd, 1886.

F. W. KIMBALL,
Manager Construction.

Dear Sir:

Will you kindly provide right of way for the line near Liberty. It is desirable to open the heavy cuts on the third division at once. At 1066 and at other points I am advised it is impossible to do this on account of delay in right of way matters. 1010

Respectfully yours,
W. W. HEGEMAN.

I don't know when the rights of way were obtained. It is very possible there was a delay for extra right of way for borrow between Stations 360 and 370 on the Dwyer and Huntington work.

This question of delays that had been occasioned by the Railroad Company in reference to the $40,000 penalty was not taken up by me or Mr. Hegeman that I remember of. I had nothing to do with that anyway. When this nut lock question first came up I had some talk with Mr. Hegeman about it. He objected to being charged for them. I said, "Well, 1011
let that matter stand until the end of the work," something of that kind; that that could be adjusted later. I think he claimed that it did not belong to them to put them on. I don't know that there was some understanding in regard to the taking of what materials were left over—that that was to be taken only which conformed to the standard used on the road. I think he was using that standard, or he wouldn't have had it. I think we took all good material from him. If there was any rejected timber we didn't take it. I would say that, as I remember it, Mr. Hegeman turned over

all material, except there might have been some material culled in the prosecution of the work. I understood that he had turned over to the Railroad Company all material of every kind, whether culled or not. I don't say he did so. I thought that he had. I remember that there was a washout after they got through the work near Dawn. That was after I had anything to do with it that was in the hands of the Superintendent. I remember hearing something about it. I never heard that they used some of this timber that the Railroad Company refused to take off of Clark's hands until after this trial came up. I stated the language of the telegram which I saw, that was received just after the making of this contract as near as I could remember it. I can't say that my words are exact; but as near as I can remember that was the import; I don't say that those were the exact words, although it seems to me that those were the exact words, "All right. Will complete by June 1st or forfeit the $40,000," as I remember it. That may not be the exact wording. Heman Clark's name was appended to that. It came through the telegraph office, and of course it was not his personal signature. I do not remember the date of it. I should say the latter part of March or the first of April. What I have to remember by is that it was within a comparatively short period after I had been told the contract had been signed. I did not see the telegram in Miller's office just as it was received. When I first saw it I can't say, but within a very short time. It might have been the same day it was received, it might have been two or three days later, and it might have been a week. This question had come up, as Mr. Miller's letter explains, in regard to that $40,000, and I told Mr. Miller my understanding of it also, and he looked at the contract, as I remember it, and wrote Mr. Clark that letter. And later I may have made inquiry, but one time when I came in Mr. Miller handed me out this Western Union telegram and I read it. It may have been at

my request. I may have asked him if he had received anything or something of the kind. 1015

Q. Was there anything like that on the bid in regard to the forfeit of $40,000? A. Yes, it said if given until August 1st would do it for $40,000 less; it was $40,000 off from $19,500 a mile, based on the distance from Ottumwa to Harlem. $19,500 was not, I think, in the bid. The $40,000 was not off the $3,990,000. I wouldn't say whether the figures $3,990,000 were on the bid or not. I will not swear that they were not. It is not my best recollection that they were. I shouldn't say anything from what Mr. Miller said. I go by my own remembrance of the matter. I will not say that $3,990,000 were not the figures that were on the bid he submitted. 1016

FRANCIS W. KIMBALL, REDIRECT-EXAMINATION continued:

I had this telegram from Mr. Clark about the $40,000 in my possession for a few moments at the time when I first saw it, which was in a few days or possibly within a few hours after it was first received. I handed it back to Mr. Miller. I saw it one time since, at the time that we were making up the account, or rather the time the account was taken down to Mr. Cary to make out the final receipt; it came before me at that time again. I never saw it since that time. 1017 There is a special circumstance that I recall, by reason of which I remember the fact about the telegram after the contract was signed. I was down in Mr. Miller's office and the question as to the date and price entered in the contract was between Mr. Miller and myself. And it was at this time of the conversation that Mr. Miller wrote the letter of March 19, 1886, to Mr. Clark. He dictated it in my presence. It was after that that I saw the telegram.

I remember the provisions of this contract in Section 2 of Article 17, that the road should be com-

1018 pleted in seven sections of 25 continuous miles each, and one section of 27.8 continuous miles, the first of said sections to commence at the City of Ottumwa and when so completed in accordance with the terms of this agreement and to the satisfaction of the first party's engineer, the same shall be turned over and accepted by the said first party. That was the order of construction. I complained to Mr. Hegeman at several times of the lack of necessary force to do the work work and also to Mr. Clark. I complained to Mr. Hegeman verbally and by letter. I couldn't say now the number of times, but several times. We had several discussions about it. The force was very hard to get that season, and his men would scatter before he got
1019 them there, and I made some suggestions to him in reference to the method of getting them there. I complained to him about some of the heavy work on the lower end of the line not being started, and he told me he was somewhat handicapped by Mr. Clark in one or two instances promising the men some work on the upper end of the line and also promising them some work on the lower end of the line; and they couldn't get to work on the lower end until they had completed their work on the upper end and had been transferred. Practically all this work was done by sub contractors of Mr. Clark. The same men had contracts on more than one portion of the line in a few instances.

1020 I do not know of any place where they didn't have the right of way in time to complete the road before the 1st of June, 1887.

In heavy work they went from one part of the work to another, and in some of those heavy cuts they would work several months, perhaps on one side one month and on the other side the other. I do not know of any delays on the part of the Railway Company that prevented the final completion of the work before the 1st of June, 1887. There was a considerable part of this road which Mr. Clark never did finish. There was considerable work taken off his hands. I know that there were deductions

made for a large quantity of work, a considerable quantity of work, in the final estimate that Mr. Clark never completed.

FRED. G. KUEHNLE, a witness on behalf of the defendant, testified as follows:

My name is Fred. G. Kuehnle. I live now in Dubuque, Iowa, and am employed on the Illinois Central Railroad at Dubuque. I was at one time employed by the Chicago, Milwaukee and St. Paul Railway Company, from March, 1885, up to 1892. I was employed in March, 1888, at Chillicothe, Missouri, on the Kansas City extension. I began my employment there in July, 1887, and continued there until 1892. I was shipping foreman and yard foreman, looked out for all the material; general foreman at the Chillicothe yards. That is where I was employed in March, 1888, and all through the year 1888. I knew about the building of the Kansas City line, the extension. I was there during the progress of the work from July, 1887. The roadbed and section houses and bridges and depots were built by Mr. Clark; that is, he was head contractor of it. He had other contractors there. They stopped work somewheres in November or December, 1887. They picking up material and doing some little work that had to be patched up, some work they did not do right. I remember about some lumber being left over when they finished the work. The C. M. and St. P. Railway Company received somewhere about 160,000 feet from Mr, Clark of lumber and materials, timbers. And then there was a lot of them what the company would not accept, the poorest. This was piled up, some in the Chillicothe yards and some was lying along the line of the road. What the company took from Mr. Clark was most of it cattle-guard frames, cattle-guards and some, a few sticks of long timber which was intended for cattle-guards, some three-inch plank, some fencing boards and a lot of already made

gates, farm gates for farm crossings. A few bridge ties; not very many. There were some switch ties. There was some piling, a few piling. The whole amounted to something over 100,000 feet, some 167,000 or 137,000. There was a lot of stuff what they piled up separate in the lower end of the yard, which the company would not accept. That consisted of some bridge timber and bridge ties and some poor coal ties. I understood that some of Clark's foremen sold some of it to private parties, farmers and some people what lived around the city. It was taken away during that same winter and up until spring. I was there in June, 1888. I remember the time of the washout near Chillicothe in June, 1888.

One washout was between Chillicothe and Dawn, and one washout was between Dawn and Ludlow, and one between Bramer and Ludlow. They were all at the same time. None of this lumber that was set aside there that was not taken by the company from Mr. Clark was used at the time of that washout in any of these washouts. We used the company's lumber. We were particular about that. There was no more of Mr. Clark's lumber there at that time. It had all been taken away before that —it was all gone. I am quite sure none of it was used for any purpose connected with that washout or any of those washouts:

CROSS-EXAMINATION by Plaintiff's Counsel:

I was foreman in the Chillicothe yard in 1888; I remember who went over the line and selected this lumber which the company took, which I saw amounted to 160,000 feet. I think it was Joe Austin, he was there at that time, and Mr. Carpenter. They were representing the railroad. Mr. Van Aiken, Mr. Gilfoyle, and Mr. Hegeman and Mr. Chapman represented Mr. Clark. That was during the winter, between 1887 and 1888, December, 1887, and January, 1888. The lumber that the company took consisted of cattle-guards and planking and fencing,

&c., was separated and piled up in the Chillicothe yard, in the east end of the yard. There was a lot that the company did not accept. That was in the south end of the yard. I helped measure it in the east end of the yard. I knew that it was there, None of that was used before the first of March, 1888. Most of it was used the next fall—in the fall of 1888. It was pretty nearly all shipped to the Council Bluff line during the winter of 1888 and 1889, beginning about the first of November, we made a lot of snow fences and that kind of work. That was pretty nearly all sent to the Council Bluff line. They stopped doing the main work there either the first part of December or the latter part of November. Trains began to run through to Kansas City in October. In November, 1887, the contractors were finishing up their work. They just laid the track right on top and then they had to grade down after laying the track, and then they were picking up some material and there was some work where they had riprap, and there were places where they laid the track as they could and then they graded it up so that they could get the road through, and after the road was completed and they took a month or over to get it up to surface so that they can run trains without any danger, and they were doing that during the month of November. They stayed and helped to pick up that material until pretty nearly spring. This material was piled up, that they picked up in the south end of the yard—and after that they all went away. I cannot give the exact date of this washout or these washouts; it was the first part of June, 1888. It was all in one night, the whole washout. The lumber and material that was piled in the east end of the yard was not used in repairing these washouts. There was none, hardly any in the east end of the yard. There was not any material that had been taken from Clark that had been piled in the east end of the yard, used in repairing these washouts. The material that had been taken from Clark had been

piled up in the east end of the Chillicothe yard and was sent by the Company in the months of December and November, 1888, and up into the spring following, to the Council Bluff division. From November, 1888, and in the spring of 1889, that was sent to the Council Bluff yards. It was not used in repairing these washouts. The other material that the Company would not take and had been rejected, was piled in the south end of the Chillicothe yard. That is where it stood. That was material of odd lengths and not standard material that the Company used in its road—it was odd ends. It was rough material; some rotten; some been laying there quite awhile; it was unfit to go into bridges or bridge work—it was unfit because of decay and because of not being standard lengths. They repaired the washouts during that summer. They immediately began to do the work as soon as the washouts occurred, and it required lumber and material to do it. This lumber was not there before the washouts. I could not give the names of the foremen that sold this lumber. There was one man named Clark; I seen him; he hauled some stuff away; he didn't haul it, he had it hauled. He was a foreman of Clark's. I don't know his first name. That was done right after—they commenced to pile it up as soon as they were through, and they were probably two or three weeks piling the lumber there, for the lumber was fetched in there. I could not just exactly say how many feet there was in this pile of material; probably 20,000 feet laying around, of material. It was not exactly piled up; it was scattered more or less, five or six dozen pieces in a pile. There was there about 20,000 feet in my judgment, in that neighborhood. It was on the Company's land.

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1032

REDIRECT-EXAMINATION:

The Company did not sell any of that lumber that was in the south end of the yard. They did not haul it away or have it hauled away. They did not use any of it.

RECROSS-EXAMINATION by Mr. Rose: 1033

They got the material that was used in repairing these washouts out of the general yard. That was on the other side of the coal shed at Chillicothe. I saw them haul it away in the cars and assisted them in loading it.

REDIRECT-EXAMINATION:

The Railroad Company had more lumber in the Chillicothe yard than was in either of those two piles. They had, I guess, over 400,000 feet of timber in there in the yard at that time, and then we had a lot of bridge ties up at Gault, and also a lot of piling.

RECROSS-EXAMINATION by Mr. Rose, for Plaintiff: 1034

The men that had charge of the making of repairs caused by the washouts for the Milwaukee Company was Mr. Louis Besse and I. He was chief carpenter at that time; where he is now I cannot say; they removed him from there to Toma. I do not think he is with the Company now. He is not in the employ of the Company.

D. G. WHITTEMORE, recalled, testified as follows:

I drew up the certificate which is attached to the final estimate, and it was returned according to my best recollection, through Mr. Kimball, to our Company, the Railway Company. Some time after, during that same day, and I think the afternoon, I was 1035
called to the general manager's office, and there found present Mr. Miller, the general manager, Mr. Hegeman, and John W. Cary, the attorney for the Company. The only conversation that I can recall as taking place at that time was the matter of what should be retained from the final amount due Heman Clark under his contract on account of liens that had been filed against our Company, for which Mr. Clark was responsible. That was the matter that resulted in the retention of this $40,000. There was a discussion or talk I might say between

1036 General Manager and Mr. Hegeman as to the amount of the King & Wetherill claim which had been filed, I believe, against the Company. They all, added together, amounted, according to my best recollection, to something over $30,000. It was arranged—I cannot say whether with Mr. Hegeman, but with his knowledge certainly—that $40,000 should be retained on account of these claims, and Mr. Kimball was given the final estimate and another paper and directed to draw a receipt. I went over the accounts with Mr. Hegeman that are included in my final estimate as credits and debits, and asked him if he had any further claims about the 17th of February. That was when he was there at that time,
1037 and he made no further claim when he came there on the 3d of March. He presented no further claims then, not to me. I went into the president's or general manager's office. Mr. Hegeman was present with the general manager when I went into the room. I have found out what time Mr. Hegeman was in Milwaukee, the dates he was at the hotel, and that confirmed my recollection. It was in accordance with my recollection. He was in Milwaukee on the 17th of February, 1888, and several days prior to that, and then he was there on the 2d and 3d of March, 1888.

[DEFENDANT RESTED.]

1038

FRANK S. BOND, being duly sworn in behalf of plaintiff, testified as follows:

DIRECT-EXAMINATION by Plaintiff's Counsel:

I am an officer of the defendant company. I live in New York City. I first became connected with the St. Paul road in 1886. It was after this contract was signed. I succeeded Mr. Wadsworth as vice-president. He resigned, and I was elected in his place. The company had an office in New York,

where we are now, for a financial and transfer office 1039
of the company. The treasurer does not live here. The moneys for dividends and coupons are paid here. All the financial operations are transacted through this office. Payments for contracts are not made here, unless they are made by draft or voucher sent here. That has always been so. In 1886 the place for the payment of contracts was at the West, at Milwaukee. The financial office has always been here for all payments except the current payments at the West—contracts, payrolls, vouchers and things of that kind. They have always been in the habit of paying contracts out West. The money was paid, from time to time, on account of Heman Clark's contract, I think, with three exceptions, 1040
they were all paid at the West. Those were payments made by me. One was a payment of July 25, 1887, of $100,000; one was a payment of September 1, 1887, $100,000, and the third is the $173,000 that you have the voucher for, the final payment.

Plaintiff's counsel offered in evidence the vouchers for the first two payments mentioned by the witness, one of July 25 and the other of September 1, 1887.

Said two papers are marked **Plaintiff's Exhibits Nos. 46 and 47, April 4, 1896**, and are as follows:

"CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.
To HEMAN CLARK, Contractor, *Dr.*, 1041
New York City.

1887.		Amount.
July 25.	For amount allowed by the General Manager to be paid from the amount heretofore retained from monthly estimates made under the Heman Clark contract for constructing the Kansas City Line.....	$100,000 00

Order of Gen. Manager, telegram attached.
Approved, D. J. WHITTEMORE, Chf. Engr.
Approved, E. N. SEWALL, Comptroller.

1042 Received of the Chicago, Milwaukee & St. Paul Railway Company One hundred thousand $\frac{0}{100}$ Dollars in full for the above amount.

HEMAN CLARK.

Dated July 27th, 1887."

Across the face of the above is written, "F. W. Kimball."

"CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.
To HEMAN CLARK, *Dr.*,
New York.

1887.		Amount.
Sept. 1.	For this amount as payment on account of moneys retained under terms of contract with the Railway Company for construction of Kansas City Line.....	$78,204 67
	(Original amount retained). $500,000 00	
	Paid by former voucher $100,000 00	
	Paid by this voucher 78,204 67	
	——— $178,204 67	
	Amount retained this date.. $321,795 33	
1044	For Balance due on estimate of Aug. 15/87.....	21,795 33
		$100,000 00

Approved, ROSWELL MILLER, G. M.

Received of the Chicago, Milwaukee & St. Paul Railway Co. One hundred thousand Dollars in full for the above account.

HEMAN CLARK.

Dated Sept. 7, 1887."

I first saw the paper which is marked Defendant's Exhibit No. 36, before it was signed. It was sent

to me from the West. It was sent with a letter 1045
which I have. It is dated March 7, 1888 (handing letter to counsel).

Said letter is offered in evidence and marked "**Plaintiff's Exhibit No. 48, April 4, 1896,**" and is as follows:

"MILWAUKEE, March 7, 1888.

Major FRANK S. BOND,
Vice Prest.,
New York.

Dear Sir:

I enclose herein statement of Heman Clark's account showing balance due him of $173,532.49; also a receipt drawn by Mr. Cary for Mr. Clark to sign upon payment of the amount. 1046

Respectfully yours,
ROSWELL MILLER,
Gen. Manager, L."

That letter is not signed by Roswell Miller. It is signed by Mr. Lenox. He is a man in his office who attends to such business. I do not know whether Mr. Miller was in Milwaukee at that time or not. He was not here on March 7, 1888. Whether there was any other enclosures came with this receipt I am not certain. I don't think there was, although it is possible another enclosure came. My impression is that the statement I have in my hand was sent at the same time, for it is dated the 1047
same date. It is the first statement of account. My recollection is that that came on at the same time, for I find it with that letter and with this copy of the receipt, which shows the whole transaction at that time. The original copy of that as signed I sent back to Mr. Miller.

At the request of plaintiff's counsel, the paper is marked "For Identification A, April 4, 1896."

Mr. Kellogg: Plaintiff's counsel offered this statement in evidence and it was marked **Plaintiff's Exhibit No. 49, April 4, 1896.**" It is as follows:

1048 "H. CLARK, Contractors, in Account with the C. M. & ST. P. RY. Co., March 3d, 1883.

	To—	DR.	CR.
	21,575 Tons, 1,642 lbs. rails at $37	$798,302 04	
	1,526 Cedar ties at 32c.	488 32	
	1,458 Cedar ties at 32½c.	473 85	
	500 Oak ties at 46c.	230 00	
	Loading 3,484 ties at 1½c.	52 26	
	Freight on 3,484 ties	494 11	
1049	48 Ties delivered to G. G. Henry	19 20	
	169,579 Angle bars — 5,046,141 lbs. at .0165	83,261 33	
	2,411 Kegs track bolts at $5.20	12,537 20	
	5,800 lbs. bolts at .026	150 80	
	7,980 Kegs track spike at $4.50	35,910 00	
	573½ Boxes nut locks	9,458 63	
	Four crossings and loading	429 41	
	Ten pumps and boilers, valves, etc	3,711 14	
1050	Lumber invoices	100,202 35	
	Cement invoices	2,171 85	
	Hand, rubble and velocipede cars	1,456 50	
	Coal and Wood	1,087 93	
	Use of ditcher	96 80	
	Rent of steam shovel, June	650 22	
	Rent of steam shovel, July	2,197 17	
	Rent of steam shovel, August	2,825 56	

Rent of steam shovel, September	$220 61
Rent of steam shovel, October	919 92
Rent of steam shovel, November	946 58
Rent of steam shovel, December	679 86
Piles fur. and use of engines and crews	272 96
Material and labor fur. at Ottumwa	109 35
Rail frogs, conn. rods and labor	101 62
Signs, driving and loading piles, etc.	610 50
Signs, etc.	1,957 50
Damage to cars	87 81
Vit. pipe, smoke stacks, castings, etc.	1,815 84
Engines and crews	196 68
Labor and material	5 50
Trackage of engines, and labor	156 66
Labor putting in switch	104 52
Wire, labor and lining trestle crossing	63 25
Freight claims and charges	107,865 11
T. Ryan, use of land	25 00
Drainage at Blakesburg	15 00
Injury to cattle and damage to property	1,607 38
Bill for 22 round-house frogs at Ottumwa and loading steel and timber	558 38
Bill spiking, Chillicothe yard	74 94

1054	Bill syphoning water, September	$50 95	
	Bill enclosing water tanks	900 00	
	Bill ditching, etc	1,103 76	
	" setting signs, etc.	74 40	
	Freight on twenty steel rails	11 66	
	Putting up cross-overs, etc	247 50	
	H. P. Milliken, stock killed	33 45	
	Train service	50,000 00	
	Forfeit	40,000 00	
1055	Bill for loading timber	4 29	
	Cash	2,449,434 29	
	Stringers used by Van Aiken & Guilfoil	53 32	
	Freight charges on sawed iron, etc	349 94	
	Balance due Heman Clark	213,532 49	
	CONTRA.	CR.	
	By—		
	Approximate estimate May 15, 1886		$36,100 18
1056	Approximate estimate June 15, 1886		144,020 30
	Approximate estimate July 15, 1886		203,923 18
	Approximate estimate Aug. 15, 1886		327,787 24
	Approximate estimate Sept. 15, 1886		447,223 18
	Approximate estimate Oct. 15, 1886		315,601 80
	Approximate estimate Nov. 15, 1886		329,497 79
	Approximate estimate Dec. 15, 1886		325,021 50

Approximate estimate Jan. 15, 1887	$305,290 51
Approximate estimate Feb. 15, 1887	198,859 90
Approximate estimate March 15, 1887	147,369 13
Approximate estimate April 15, 1887	368,748 03
Approximate estimate May 15, 1887	128,834 28
Approximate estimate June 15, 1887	154,939 10
Approximate estimate July 15, 1887	167,599 23
Approximate estimate Aug. 15, 1887	32,147 64
Approximate estimate Sept. 15, 1887	90,146 70
Approximate estimate Oct. 15, 1887	78,869 29
Approximate estimate Nov. 15, 1887	31,840 76
Approximate estimate Dec. 15, 1887	33,890 88
Approximate estimate Jan. 15, 1888	5,023 39
Final estimate March 3, 1888	28,064 78
Fares paid and refunded	473 19
Overcharge on lumber	31 92
Repairs on culverts	41 47
Tools returned	1,099 05
Vouchers for work done	179 28
Overcharge, labor loading steam pump	2 74
Rebate, freight claims # 154498 and 154-205	26 67
Cement sacks returned	88 60

1060	Guard rails.....		$15 68
	Engine supplies charged in error....		48 34
	Material and labor....		463 54
	Material turned over to Company.....		19,878 56
	Delays by trains, etc..		118 72
	Fence posts, wire, etc.		3,642 09
	14912 Ties delivered to S. J. Collins.....		5,964 80
	Extra angle bars furnished.....		1,638 69
	34060# Imperfect bolts returned at $2.60 per		
1061	100.....		885 56
		$3,930,397, 69	$3,930,397 69

(C. M. & St. Paul Ry. Milwaukee, Wis. Mar. 5, 1888. Construction Dept.)"

Having refreshed my recollection, I am satisfied this Plaintiff's Exhibit 49 was received at the same time as the paper Defendant's Exhibit No. 36. It is a statement of account showing that balance; the balance shown there corresponds with the receipt and the date. I suppose it was received the same day the check was given, March 9th. The witness on that receipt is a gentleman by the name of
1062 Edwards, who was either in Mr. Clark's office, or in the office of the broker's firm adjoining his office, in which he was a special partner. His name was William C. Edwards. I have seen him. I did not see him write his name there, nor did I see Mr. Clark write his name. I was not present when the receipt was signed by Mr. Clark. When or after I got the receipt I sent it up to Mr. Clark, I think by one of the clerks, I don't recollect who. Mr. James B. Dumont was not an officer of the company at that time. He had been before he became a broker. He had been second vice-president of the Chicago, Milwaukee and St.

Paul before he went into the broker's firm of which 1063
Mr. Heman Clark was a special partner. Their office was adjoining Mr. Clark's office, in the same building where the Milwaukee and St. Paul was. I got this receipt on March 9. I don't recollect whether I saw Mr. Clark that day or not, or on March 8, or on March 10, or on March 6. I will not say that I did not. I don't remember any conversation with him at any time during those dates. He was represented generally by Mr. Dumont when he came down and asked for money. Mr. Dumont did not bring this paper back to me. I don't recollect who brought it. I can't tell who took it up. I sent it up the same day that I got it, with a verbal message. I sent no written message. I did not 1064
send this Plaintiff's Exhibit No. 49 or any copy of it. The messenger that I sent up with it did not bring it back. It came back the same day. I sent it up as soon as I had opened my mail, and what time of day it came back I don't know. The check was immediately drawn after it came back signed. I don't recollect who brought back the receipt. It was not a messenger of our office. I don't think that Mr. Dumont brought it back though I am not sure. I did not have any other copy of the account or know anything about it, beyond the paper, Plaintiff's Exhibit No. 49. These accounts were all kept at the West. None were sent to me. All I sent to Mr. Clark was the statement of account 1065
signed by him. I am not certain that I did not send this account, Plaintiff's Exhibit 49, to Mr. Heman Clark, on March 9, by this messenger. The fact of its being on tissue paper would lead me to suppose that I did not. I would suppose that the original had been already furnished to him. I did not furnish it to him. This is the only one that came to me. I don't know of my own knowledge of any other one being furnished to him. I do not swear that I had no talk with Mr. Clark upon this subject, or upon the account, or upon the matters in the receipt, during those days. I don't think I saw

Mr. Clark after I got this account and receipt, until after the check was paid. I may have. I don't remember any conversation at that time. Mr. Clark and I did not go over these accounts at our office, nor did Mr. Clark and I go over this receipt at our office. It was sent up to him to examine. I did not go over it at any time. I possibly talked with him about it before I received it. I think I did have a talk with him before I received it. He came to the office and wanted money. I cannot tell you what the talk with Mr. Clark before I received it was, or what day it was, nor how long before, or whether it was within a week. I don't say that I had any talk with him; but my impression is that I had a talk with him and with Mr. Dumont with reference to the balance that was due. It was very short, whatever it was, in my office. Some time preceding this final payment. They were anxious for money. I said whenever the voucher came on it would be paid; substantially that was all. I didn't know what the voucher was, or anything about it. I didn't know anything about this account; not at all. I never knew anything about it except what was stated in that voucher that I had paid $100,000 on. That I only knew by seeing it. I don't think I had any talk at that time with him and Mr. Dumont about paying the money out West. I did not know that Clark had been telegraphed to know whether he had given any authority to Mr. Hegeman to settle accounts. We had no discussion of that kind. I haven't got any letter among my letters received at or about that time, telling me to make the settlement with Mr. Clark, none other than the letter offered in evidence to-day. It is possible I had a short conversation with Mr. Clark and Mr. Dumont, just prior to the receipt of the receipt to the extent that they wanted the money paid, wanted me to advance it, and I declined to advance any money except on a voucher from the West, and said that I would pay it as soon as that was received. I didn't say in this talk with Mr. Dumont that I would talk

with Mr. Miller, who was to be in town—no conversation about Mr. Miller whatever. He knew perfectly well when the voucher came on it would be paid, for I had the money here to pay it. I cannot tell how long before this voucher came on I had seen Mr. Miller in New York. I did not see him in New York on March 7th. I know he was not on about that time. I am absolutely positive about it. He was not here on March 9th. I am positive of that, because I know he was not here when that account was paid. He was not at the office. I don't know where he was. I notice that he did not sign the letter.

CROSS-EXAMINATION by Defendant's Counsel:

The circumstances in connection with the signing of this receipt or statement of account, and the sending of it to Mr. Clark were these: The Burlington strike had demoralized all our western roads. There was a strike on our road. And just about the last of February and early in March, Mr. Dumont, and I think Mr. Clark also, was anxious for money on account of the balance due on account of the contract. My impression is that both called upon me. I told them whenever I received the voucher from the West it would be paid, as I had already paid two previous vouchers. Mr. Dumont represented to me that Mr. Clark was carrying a line of stocks, and they had fallen very heavily. He didn't represent that, but I know of course that he couldn't have any line that didn't fall. Nothing was said about not making a payment until there was a final settlement and statement of the account—not by me. Mr. Clark knew, or Mr. Dumont, or both of them knew, that a final statement was being prepared, and they inquired for it once or twice. As soon as I received it I sent it up to Mr. Clark's office, with a message that when it was signed a check was ready and it would be paid. It came down signed and witnessed, the check was delivered to whoever brought it for the amount, as you

1072 see by my signature, and I transmitted a copy of the receipt to the West. Those are the circumstances under which it was paid.

REDIRECT-EXAMINATION by Plaintiff's Counsel:

I wish to qualify my statement that I sent by the messenger a final estimate to Mr. Clark. I sent that paper Defendant's Exhibit No. 36. I didn't have any final estimate. The only statement I had was that copy of Defendant's Exhibit 36. By my statement of the word "it," which I received and sent to Mr. Clark, I meant this receipt which contains a statement of the final estimate. That statement is what I meant by the final estimate.

1073

RECROSS-EXAMINATION by Defendant's Counsel:

I desire to explain or correct certain parts of my previous testimony. I first became connected with the St. Paul road in December, 1886. Mr. Wadsworth resigned as vice-president, and I was elected vice-president in his place. I was not elected a director in his place, but as vice-president. I was elected in the place of Mr. Dumont as a director. In answer to the inquiry as to when I saw Mr. Clark I would say I now recollect I saw Mr. Clark on March 7th. I want to correct the record as to my answer to the question "Haven't you got any
1074 letter among your letters received at or about that time, telling you to make the settlement with Mr. Clark?" My answer was: "No, sir; none other than the letter offered in evidence to-day." As a matter of fact there were other letters about that time relating to the subject. I have them here. James B. Dumont ceased to be an officer of the company in December, 1886. I succeeded him as director, but not as second vice-president. I succeeded Mr. Wadsworth as first vice-president, but I was elected a director in place of Mr. Dumont. In answer to the question, "Will you state whether or not anything was said about not

making a payment until there was a final set- 1075
tlement and statement of the account." I couldn't have understood that question, because the answer there is, "No; not by me." The answer should be, "I declined to make any further payments until the accounts should be finally adjusted at the West and a proper statement and voucher returned to me." I so stated to Mr. Clark and to Mr. Dumont. In reference to my statement that "Mr. Clark knew, or Mr. Dumont, or both of them knew that a final estimate was being prepared," it should be: "A final statement of the account was being prepared," instead of "a final estimate." The only statement I had was that copy of Defendant's Exhibit 36 and Exhibit 49. I meant this receipt which 1076
contains a statement of the final estimate. That statement is what I meant by the final estimate. On the 5th of March, Mr. Dumont came into the office and wanted to know if I had received the voucher for Mr. Clark, and I told him I had not. On the 7th, I think it was, Mr. Clark came in and asked the same question, and I told him I had not. He said he understood that a voucher had been prepared for about $200,000. Mr. Clark never made any objection to me as to anything stated in this final receipt and statement of account of March 9, 1888, signed at the time I gave him this check for $173,000. He never stated to me that there was anything incorrect in that receipt. 1077

REDIRECT-EXAMINATION by Plaintiff's Counsel:

After I received this copy of the account and the voucher and receipt, which were drawn in Milwaukee, I did not see Clark at all until after it was signed. I have seen him a great many times since, before this case was commenced. I never talked to him at all about this matter. It was within two or three days before I received this voucher that I saw him. This voucher was sent to me; it was accompanied by that statement of the account. I did

1078 not send that to Mr. Clark. I did not send to him any final estimate. I never saw a final estimate in his hands. I did not have it. I don't know how long before this voucher was received that I saw Mr. Miller in New York. He was not here at the time. I am sure of that. This opinion is confirmed by letters that I have here. The way by which I make my recollection positively accurate on this point is that I received a letter from Mr. Miller dated March 9th, signed by him as General Manager. I answered it on the 13th. That shows that he was in Milwaukee at that time, on March 9, 1888. On the 12th he acknowledges a letter received from me written on the 9th of March. The March 12th let-
1079 ter is in relation to the voucher. That makes me certain that between March 9th and March 12th he was not here. The voucher was mailed from Milwaukee, March 7th, and I have a letter written by Miller of March 9th. The letter of March 7th, that enclosed the statement, was not signed by Miller. It was signed by Mr. Lenox. I do not know where Mr. Miller was then. I know he was not here. We don't live together, although he very frequently stays at my house. I won't swear that Mr. Miller was not in town at all in March, prior to the receipt of this voucher, but I am sure he was not. I test my recollection by these letters. My letter to him to Milwaukee was dated March 7th,
1080 showing that he was not there at that time. I don't know whether he was here in February. I won't say that he was not.

Plaintiff's Counsel offered in evidence an agreement made between the Hannibal and St. Joseph Railroad Company and the St. Paul Railroad, dated the 27th day of October, 1887.

Defendant's counsel objected to it as not complete, and as immaterial. It is shown that the rights of way had been procured long before that.

Admitted, subject to comparison with the original, and marked "Plaintiff's Exhibit No.

50, May 16, 1896," and defendant's counsel ex- 1081
cepts.

By the said agreement the Hannibal and St. Joseph Railroad Co. leased to the Chicago, Milwaukee and St. Paul Railway Co., for the term of 1,000 years, certain premises therein described, being part of the right of way of the H. and St. J. R. R. Co., in the County of Clay, Missouri, shown on a map or tracing attached to said instrument, to be used for railroad purposes only, with certain reservations to the H. and St. Jo. R. R. of a right of way over and across the track of the C. M. and St. P. Ry. and the C. M. and St. P. Co. agreed in consideration of such lease to grade and construct a single track railroad for a new line for the H. and 1082
St. J. R. R., as described, and to pay the expense of constructing the track thereon, said track to be the property of the H. and St. J. R. R. Co, and the C. M. and St. P. Co. agreed to convey to the H. and St. Jo. Co. the premises and right of way on which said new track was to be laid.

WILLIAM W. HEGEMAN, recalled in behalf of plaintiff, testified as follows:

DIRECT-EXAMINTION by Plaintiff's Counsel:

Q. I wish you would be kind enough to explain just what was done in regard to this Minnaville 1083
crossing, and in relation to your going to work, before or after this agreement of October 27, 1887? A. Either in August or September, 1887, we moved our force to Minnaville and laid track from near Minnaville to the Missouri River Bridge. Minnaville is on the Missouri River, about six miles down the river from where the Chicago, Milwaukee and St. Paul's new bridge now crosses the river. And later on we graded, some time in October, I think, about half a mile of roadway which had been left open south of the Minnaville crossing of the Hannibal and St. Jo. road. After the 27th of October we con-

1084 nected the main track of the Chicago, Milwaukee and St. Paul with a portion of the main track which we had previously laid, and exchanged tracks with a short piece of the Hannibal and St. Jo., as shown in this agreement just put in evidence. The original location of the Chicago, Milwaukee and St. Paul showed a crossing of the Hannibal and St. Jo., at a point further north than was fixed by this later contract, something like six or seven hundred feet. When we got ready to do the work we were prevented by the Railroad Company's engineers, because it had not been finally fixed where the crossing should be made of the Hannibal and St. Jo. They stated that the point
1085 was fixed and adjusted where the crossing was to be made so far as the grading of the roadway was concerned, the latter part of October, 1887. A few days previous to that. A force was put on and the grading completed on the south side of the present crossing. We were not permitted to do any work there until this time. I am sure about it. Further, our contract embraced track laying. We were not permitted to lay the track on this portion of track exchanged with the Hannibal and St. Jo., because the provision of the Hannibal & St. Jo. contract was that the Hannibal and St. Jo. should lay their own track where the track was exchanged. And it was not until the 27th of October that we were notified
1086 by the engineers of the Hannibal and St. Jo. that the agreement was regularly executed and in force, and that we might go on and connect. They had a force there to lay this small piece of track and make the connection and ballast it. Mr. F. Russell, our Superintendent, was in charge, under me, of this work. There was a man in the employ of Mr. Clark as a foreman at Chillicothe by the name of Clark—Milton J. Clark. He is a brother of Mr. Clark. He lives now somewhere in Ohio. He left the employ of Mr. Clark in the early fall of 1887. He was never afterwards on this railroad, nor did he have anything to do with this lumber. I was

there shortly after the washout. It was in June or 1087
July, 1888. Clark had not been in the employ or had anything to do with this matter since the fall of 1887.

At the time of the adjustment of the accounts in Milwaukee in 1888, I did make a claim for nut-locks, which was referred to the Legal Department, and nothing else was presented to Mr. Whittemore except the formal accounts. In fact I don't know that they were presented to him. The only thing that we had up at that time for adjustment was the formal running accounts between Clark and the Railroad Company which are not disputed here in this case at all. Mr. Whittemore did not make any rulings at that time. The only thing he was asked about was 1088
the nut-locks, and he threw that off and never made a ruling. He simply said he would refer that to the legal department. I said nothing to him whatever about anything except the nut-lock claim at that time. There were no claims to be satisfied with or dissatisfied with that came before him. I did not say that I was satisfied with his rulings. Mr. Whittemore's reference to charge for piles furnished for washout, $841.34, relates to a washout in March, 1887, within a mile of Ottumwa. I repaired it myself. There were two washouts. As to Mr. Whittemore's statement that I was shown a joint set up with the J. T. Clark splice, or a drawing of the same, prior to entering into this contract, that is not cor- 1089
rect. I was introduced to Mr. J. T. Clark, General Superintendent, to whom I said that I had been referred to him because we were to build the Kansas City line and his splice was to be used; that I came for information about the splices. He showed me a pair of forged splices (by forged I mean hand made splices), and my inquiry was as to their weight, which was given by Mr. Clark. That was all there was to the conference. By a pair of splices I mean splices on each side of the rail. The inside and outside splice on one joint. They were not set up. They were loose. They did not have any

1090 nut-locks on them. I did not see any nut-locks, nor were they shown to me prior to making the contract. Mr. Whittemore did not go with me and show me anything of this kind, the J. T. Clark splice and nut-locks put up. I do not think that he went with me to Mr. Clark at all. I never saw the plan that was offered here, showing the nut-locks and splices—not until it was offered in this case. I never saw it before. Before this contract was entered into I was familiar with nut locks. I had seen them in extensive use. It was not a new subject to me—not at all.

By Plaintiff's Counsel:

1091 I think Mr. Whittemore told me at the time we had this controversy that the nut locks were in use on something like twenty or twenty-five per cent. only of their mileage at that time. I don't know that that was including this part that we had built, That was after that had been built. The discussion came up under that clause in the first part of the contract that we were to build a complete railroad. I said to Mr. Whittemore: "Is this a standard of the company that is used all over?" He said they had been using them for some years. I asked him on what portion of the road, and he said twenty to twenty-five per cent. This nut lock that they 1092 purchased and charged to us was a patent known as the National Nut Lock. He did not say anything to me when I presented the claim for allowance, "That the Clark splice, like all other splices having angle bars, was not complete unless some kind of nut lock was used. It was universally used throughout the country wherever a splice joint was used at that time. That when we spoke of Clark splices to be used it meant the whole thing and contained twenty articles, twenty different members." There was nothing of that kind said. The conversation mainly was that as we were to build a complete road a nut-lock was

part of a complete road. Then ensued the conversa- 1093
tion I have referred to. He said he would refer it
to the Legal Department, which he did.

The Verona nut-lock is a spiral piece of steel, plain on both sides, and used to slip over a bolt for locking the nut. The National is much like the Verona, except that it has on one face a shoulder cast. It is an improvement on the Verona. They are very much alike in general principle; it is not necessary to use a nut-lock, and it is not universally used. We were told, when proposals were asked for this work, that the J. T. Clark splice would be used. I had not heard of that before, nor had I seen it. I did not inquire of anybody what it was until it became necessary to draw up the specifications of 1094
this contract. Then I was interested in knowing what it weighed, as we were to pay so much per pound. Consequently my inquiry only extended to the weight of it. I saw it at that time. The Clark splice was I think patented later. Mr. J. T. Clark was the General Superintendent of the Railroad Company and this was some device of his. Strictly speaking, a nut-lock is just what the word implies, a device for locking a nut, a nut which is on a bolt. It is no part of the bolt or splice, but is a separate invention, the function of which is to keep the nut from reversing or coming loose. There is no such a thing as the J. T. Clark splice and bolt that does not include the nut-lock, not that I know of. There 1095
never was a J. T. Clark splice used anywhere except on the Kanas City line. That was the first use that was made of that appliance for fastening a joint. Its peculiarity is in increasing the cross-section of the angle-bar of the splice at the joint and tapering the metal toward the end, so as to get less metal in. Also right at the joint to raise it, make it a little bit higher, the purpose being to hold the joint up tight, and little bit high. It is done by making the top surface of the angle-bars higher in the middle than at the end where it supports the rail.

1096 By the Referee:

Q. Mr. Whittemore claimed that the requisition that you should use the J. T. Clark splice and bolts and spikes and ties involved by necessity the use of the nut-locks. I want to know what you have got to say about that. I know you deny that. Why deny it?

A. I deny it because, going further back than that, we undertook to draw this contract so as it would cover everything, and we specified everything, and we specified rails and ties and bolts and spikes and angle-bars. Consequently if it had been understood by me, or if it had been discussed at that time, that
1097 we were to use nut-locks a price would have been put in for nut-locks. It was testified by Mr. Whittemore that Clark's standard nuts and bolts and angle-bars embraced twenty pieces, and I think he said they had a drawing of it. I was not referred to that drawing. I was referred to J. T. Clark personally, who was then General Superintendent of the Milwaukee Railroad. I went to him. I said "We are drawing a contract to build the Kansas City line, and the J. T. Clark splices are specified. We have made a price per pound at which they are to be sold by the Railroad Company to us, and I want to see how much they weigh." He told me. They didn't weigh what he told me, because the rolls to make these splices had not been prepared.
1098 The pair I saw had been forged by hand, made in the shops, simply two splices, not rolled at all, and the weights were given from those. They were rolled afterwards I think in the Chicago Rolling Mills. The nut-lock does not figure at all in the weight, because it has never been considered. Our contract specifies a price per pound for angle-bars, and a price per pound for bolts including nuts. We didn't weigh nut-locks, just weighed the two splices. So that if we did put in the nut-locks we have not been paid for them not even by weight. They sent a nut-lock to us without saying anything about it,

and I called their attention to it and asked them if they wanted them put on, and they said yes. I said "How about pay for them? It is not included in the contract." They said to let it go until finally and then they would adjust it. The nut-locks were sent right along, sometimes on our requisition and sometimes on the order of their manager of construction, Mr. Kimball, and were used throughout the whole line, and were charged against us and deducted; they were charged at whatever the Railroad paid for them, invoiced to them. Suppose they were considered as coming within the angle-bar clause; there is a provision here in the Sixth Article of the agreement, by which we were to purchase from the Milwaukee Railroad all the steel rails, angle-bars and spikes for same, &c., and then it gives prices. Nut-locks would not come under any of those designations. They would not come under angle bars. Suppose they did. By the pound they would amount to very little. They would amount to very much less as compared with the $9,000 that has been charged here. I think the charge is about two and three-quarter cents apiece for a nut lock. By the pound it would take twenty or thirty of them to make a pound. As I understand it, if the nut lock is a part of the splice it is a part of the angle bar, not a part of the bolt or of the nut. The angle bar is the splice. They are synonomous terms. If the nut lock were part of the J. T. Clark splice, and we still should be paid by weight for it under the price of the angle bars, it would not pay us one-twentieth of the cost of the nut locks by weight one-twentieth of what had been charged to us. They have charged us $9,000 for what certain nut locks cost them.

The Referee:

Q. There is one theory on which they have the right to charge you for those nut locks, because they notified you in the contract itself, and by word of

1102 mouth, that you were expected to furnish the J. T. Clark splice, and the nut lock is part of the J. T. Clark splice. If so, inasmuch as you were to build the road with the J. T. Clark splice, and immediately afterwards there is a price per pound, the question I want to get at is whether the price which they ought to dock you should be $9,000 which they paid for the nut locks, or one dollar and some odd cents which they agreed to charge you for angle bars? A. The bolt is just as much a part of the J. T. Clark splice as the nut, under that theory, and a different price is fixed for that.

1103 WILLIAM W. HEGEMAN'S EXAMINATION by plaintiff's counsel continued as follows:

Q. Mr. Whittemore refers in his testimony to an interview in 1890, in Milwaukee, when you presented a claim, claiming compensation for nut locks, in which he says: "I gave my reasons to Mr. Miller why I had not allowed extra compensation for nut locks, in Mr. Hegeman's presence, that it was included in the contract. I so interpreted the contract. And I then remarked that the final estimate had been made and payment made upon it and receipt taken, and I wondered at bringing the matter up at that late date. Mr. Cary was called in, our general solicitor." Was there any receipt present or shown
1104 to you at that interview? A. No. What did take place at that time, as I remember it, was this: The day previous I had spoken to Mr. Miller in relation to the nut locks and bridging and measurement of extra embankment in the King & Wetherill matter, and several other items. I mean by bridging the extra truss bridging. And after the interview with Mr. Miller, after the discussion of these matters with Mr. Miller, the windup was that I should write him a letter and put it all in, and make a formal presentation to him. I did this the following morning, and he then sent for Mr. Whittemore and, in my presence, questioned him

somewhat in relation to it. I can't recollect exactly 1105
what he said. But in a general sense he asked him how about these nut-locks, and how about this bridging, and so on, as his engineer. There was no other party present. I have no recollection that Mr. Cary was called in when I was there. This conversation was long after the date of this receipt, which was offered in evidence here. I had had a previous talk with Mr. Miller with regard to these different subjects. Those conversations were after the date of the receipt. I don't recollect just where they took place. Along in the summer of 1888 I saw Mr. Miller, and I remember then speaking to him about some of these matters; and again later on in New York, in his office here at 40 Wall street. The con- 1106
versations with Mr. Miller were somewhat informal or somewhat general. I had spoken to him about the quantities having finally overrun what it was supposed they would be in the first place, before the contract was commenced. I said to him, "Mr. Clark has equities here, and I think you ought to take them up." That was some time in the summer of 1888, I think, about August, is my best recollection, in Mr. Miller's office in Milwaukee. I had gone West, went through to Kansas City, stopped en route and saw Mr. Miller, and I remember speaking to him about the excess of Howe truss bridging, the excess of quantity of culvert timber, and especially the solid rock quantities, and the nut locks; and then 1107
we had a discussion over the brakeman who was killed, for which a charge was made against us of $1,999; and in a general way we went over this whole ground. About the nut-locks he said, "You ought to be paid for that." I am not sure whether it was at that interview or not that he told me we ought to be paid for it, but it was at one interview. About the brakeman who was killed, he said, "No. We must charge that to Clark." About the extra bridging he said, "Well, that is a matter we will have to look up, and we will see Whittemore." That was after the date of the receipt and prior to this in-

1108 terview that Mr. Whittemore speaks of here, that this happened; about August, 1888. It is not true, as Mr. Whittemore states, that after that interview he met me in the afternoon or evening, at the Plankinton House in Milwaukee, and asked me how it was that I was presenting claims of the nature of those presented, at that late day, and I said that Mr. Clark had promised me that I could have what I could get out of them. He did not meet me at the Plankinton House at all. I did not say that Mr. Clark had promised me that I could have what I could get out of them. Mr. Clark has not so promised me. It was not agreed that we were to bring in all the timber that was left, only to turn
1109 over to them such as was up to their standard dimensions, and that arrangement was made with Mr. Miller. What I mean by the standard dimensions is this: All railroads have certain standards of sizes of material for making repairs and renewals of existing structures. Any timber which we had on hand which conformed to those standards the company was to take off our hands, and they did, and the schedule of that was made up by my man and their man together, and so certified. I mean that there was a great deal of timber left over that was not a standard of repairs for maintenance of roadway and maintenance of bridges. I remember the circumstances of Dorwin & Company being
1110 compelled to lay up one steam shovel because they would not allow them to dump extra material. The material from the steam shovel was to go toward the Missouri River toward the bridge approach. At that time the actual location of the bridge had not been fixed. Consequently Mr. Whittemore would not permit us to dump material beyond Station 50, which was toward the bridge. That was early in 1886, and it was a long time before we were permitted to go on with the work at that point.

In regard to this Minnaville crossing, it is not the fact that the C. M. and St. P. Railway Company had

the right of way at Minnaville, both east and west 1111
of the crossing of the Hannibal and St. Jo. Road, along in 1886, not immediately west. They did not have it immediately west until September or October, 1887, not so we could do any work there. We had gotten away past that with the work; west of Minnaville was the Missouri River, but we began there in the spring of 1886. We didn't begin there before we had the right of way there. The grading was done both east and west of the railroad prior to September, 1887, except about half a mile immediately west of the Minnaville crossing. That was not because the location of the Randolph Bridge had not been definitely fixed. It was because the location of the Minnaville crossing had not been 1112
fixed. The only question that was undetermined was as to where we were to cross the tracks, as applied to the Minnaville crossing. As appears by this map and profile here, the St. Paul had a right of way coming down alongside of the Hannibal and St. Jo. Road, and between that and the Wabash Road. I believe that is so shown by that plan produced. I don't know anything about the fact, whether they did or not. I had no means of knowing. I would not say they did not have it. The plan would not show whether they had it or not. It would only show where they proposed to get it. There were three roads very close together; there the Wabash, the Hannibal and St. Jo. and the Chi- 1113
cago, Milwaukee and St. Paul were near together at that point. I testified that the track laying from the north had not come down to Minnaville until the latter part of October, 1887, and by the time the track laying got there the arrangement about the crossing was made, the connection was made right there at Minnaville. The arrangement was all ready for us to make that connection when we got there with the track laying; when we got there with the track laying from the north it was ready for us to make connection at Minnaville. We were not delayed as

1114 to track laying there. The big delay occurred at Gault, on account of not allowing us to get work there. We were laying from Gault south. There was where they were going to fix a terminal station. We were not permitted to do the grading, and the grading was heavy, and that prevented us from going south. There was also delay at Minnaville, or five miles either way. We were not permitted to do that grading until October, 1887. Gault was made a base of supplies from which to lay track south. Between Gault and a point four or five miles west of Gault until the divisional terminal yard was fixed at Chillicothe, we were prevented from doing any work of grading or other work from the early spring of
1115 1886 until the fall of 1886. There was a written order to that effect. There were requests on my part from time to time to the engineer to let us work and he refused to do it.

At Minnavile, immediately west of the point selected for the Minnaville crossing, for about half a mile there was a delay grading. We were not permitted to do that grading until October, 1887. Gault was made a basis of supplies from which to lay track south. I do not mean to say that until the place of crossing at Minnaville was determined we could not do any work between Gault and Minnaville.

1116 By Defendant's Counsel:

It is the fact that we began work at Gault, we went around there, under the circumstances mentioned in a letter which has been produced, in which I said I understood the work was to be done in sections from Ottumwa, and transferring around from Gault it was to be at our expense, and from there we begun to work south and north in grading and track laying both. We did understand that the transfer of track material, rails, ties, bolts, spikes and angle-bars, from Ottumwa to Gault, was at our expense. We began the work of track laying in

both directions from Gault; we were not permitted 1117
to lay south from Gault because we could not do the grading; we laid track north from Gault first. That is about 100 miles from Minnaville. It is about midway between Ottumwa and Kansas City. We had arranged to lay a temporary track through what was known as the Dwyer cut, and go on with our track laying toward the Missouri river, earlier in the season. Because the bridge across the Missouri River was not completed, and because of delays at Minnaville we did not lay the temporary track through this cut, but went on and completed the excavation, and then came on with our track laying towards Minnaville. At the time we were ready to lay the track across the Hannibal and St. Jo. Railroad 1118
our grading was all completed, the last grading had been completed a few days previously west of that—west of this half-mile, and we had laid a track over it and made the final connection at the crossing. I think the Hannibal people laid that track. I think under their contract it was provided that they should lay that little piece of track themselves, and ballast it. The contract provides that the Hannibal and St. Jo. should lay it on that substituted place. The contract for the exchange of tracks provided that the Hannibal people should lay their own tracks where they exchanged roads, and ballast it, before the connection was made, and that was done. We did not lay the Hannibal and St. Jo. track. The C. M. and St. 1119
P. track we did lay. The C. M. and St. P. track was laid to the crossing and connected at the crossing from the north—no, on the east side. It was already connected from the west side.

By Plaintiff's Counsel:

The last half mile of grading was done at the end of the work near Minnaville. It was done immediately west of the Minnaville crossing. The grading on both sides of that half mile had been done a whole season, and more before. We had been stopped at

1120 this point by failure of right of way from going on continuously and laying that half mile.

Defendant, upon the call of plaintiff, produced a statement giving the dates when the rights of way on the Kansas City extension of the Chicago, Milwaukee and St. Paul Railway Company were purchased, as appears from records in the office of the Secretary of said Railway Company.

Plaintiff's counsel offers said statement in evidence and it is marked **Plaintiff's Exhibit No. 51.**

APPANOOSE COUNTY.

	Station to station.		Date.	
	1634	1642	Sept. 23, 1887.	
1121 Rathbun Depot..	1784 + 63	1815 + 35	" " "	Extra for borrow and waste.

PUTNAM COUNTY.

	3302 + 15	3315 + 39	June 7.	
	3406	3412	Aug. 30, 1887.	Extra for station grounds.
Powersville.....	3446	3448	Nov. 3, "	Extra width.
	3727 + 42	3741 + 50	June 30, "	Extra for station grounds.
Lucerne.....	3791	3791 + 75	" 25, "	Extra width.
	3793 + 10	3794 + 45	" " "	Extra width.

SULLIVAN COUNTY.

Osgood.....	5027	5032	Aug. 4, 1887.	Extra width.
	5031 + 50	5033 + 65	" " "	Extra width.

GRUNDY COUNTY.

Loredo (Gorham).	391 + 50	410	June 13, 1887.	Depot grounds.

LIVINGSTON COUNTY.

Chillicothe.....	2242 + 23	2261 + 25	June 13, 1887.	Extra width
	2240 + 73	2261 + 25	" " "	" "
	1774	1757 + 50	Sept. 13, "	Depot grounds.
122 Ludlow.....	1728 + 54	1713 + 79	" 23, "	Extra for waste banks.

CALDWELL COUNTY.

	1305	1387 + 35	Sept. 19, 1887.	Reservoir.
Braymer.....	1158 + 50	1144	Oct. 21, 1887.	Extra for borrow and waste
	1140	1120	Nov. 12, 1887.	Extra width.
	1124	1110	Nov. 1, 1887.	" "
Cowgill.....	916	885	Sept. 16, 1887.	" "

RAY COUNTY.

	369	366 + 50	July 12, 1887.	" "

CLAY COUNTY.

	417 + 43	424	June 8, 1887.	" "
	430 + 73	436 + 50	Nov. (?), 1887.	" "
	508	510	Sept. 13, 1887.	" "

MINNAVILLE, HANNIBAL AND ST. JO. CROSSING.

	1384	1404	Oct. 27, 1887.	Lease from H. & St. J. R.R.

WILLIAM W. HEGEMAN'S CROSS-EXAMINATION by De- 1123
fendant's Counsel continued as follows:

In regard to this matter of lumber, which I say was left over, I saw a large portion of it in the Chillicothe yard in the fall of 1887. It might have been in the winter of 1887; that is, after the first of December. I never saw any of it there after the first of March, 1888. I was not there at the Chillicothe yard any time after some time in March until the following August or July, 1888. I have no personal knowledge of my own what use was made of that lumber. I don't know that I have legal knowledge. I have knowledge of what was done with it. I did not see it put in that washout. I was not there at the time of the washout. I didn't 1124
see what was put in the washout. The entries of materials furnished by the Railroad Company to Clark, for which the Railroad Company was credited and which were charged to him, the record of that is on the general books of Heman Clark; I mean his regular set of office books. There was but one set of books kept.

Q. (By the Referee.) Is there anything on Mr. Clark's books about the nut locks? Why should there be; you repudiate the item. A. We repudiate it in this way. We gave them notice that it was not in the contract. They said, "Let this go on until the end of the work and we will adjust it." I daresay it was carried along in the books. I don't 1125
know. Mr. Whittemore said that a nut lock was a part of a complete road and necessary to make a complete road. That was the view he took of it at that time, as I recollect it; that is, at the time I was there adjusting the accounts, either February, or along there somewhere, 1888. It is my recollection that merely the formal accounts were at that time taken up.

Q. (By the Referee.) What do you mean by the formal accounts? A. We had long running accounts—cement, timber, railroads, &c. The mission

1126 was merely to take up the accounts in the two sets of books and straighten them up.

Q. What is the difference between formal accounts and any other accounts? A. In my experience, there always has arisen under any contract carried out as between corporations and parties some things not covered by the contract. There was never a case on record where you did not have some kind of an account to settle afterwards; I mean the formal accounts as expressing those over which there is no controversy. This matter of not finishing the line to Harlem station, that was a formal account; that was provided for in the contract.

Q. (By the Referee.) Do you mean by the formal
1127 accounts all the accounts except extras? Is that what you mean? A. What I mean by formal accounts is more in a sense accounts over which there is no dispute. I should say that the items shown on this paper are formal accounts. They are in a general sense, the items which I mean by formal accounts. I testified that the amount earned under the contract was $3,930,397.69. In that I included materials sold by Clark to the Company, and the amount of those materials sold was $34,598.90. The amount which I have testified to as the aggregate amount earned, including the amount for materials furnished, namely $3,930,397.69, less the amount for materials sold by Clark outside of the contract
1128 to the Company, is the net amount earned under the contract. Assuming that the figures are correct, that would be the net amount earned under the contract, except such items as are in dispute. There is a dispute, as I understand it, as to the item of outhouses. There were other things that were adjusted after this. I said that I did make a claim for nut-locks at that time, and I said that nothing else was presented to Mr. Whittemore except the formal accounts. I said there were no claims to be satisfied with or dissatisfied with. That answer is in relation to the nut-locks. I did so swear, that there were no

claims to be satisfied with or dissatisfied with. 1129
That is the exact language.

FREDERICK RUSSELL, witness for the plaintiff, being first duly sworn, testified as follows:

I reside at Lima, Ohio. My business is that of a railroad contractor. In the years 1886 and 1887 I was Assistant Superintendent of Construction on the Chicago, Milwaukee and St. Paul Railroad, known as the Kansas City Extension Line. I practically had charge of the track laying and the completion of the track which had been turned over to the Company, and I also went at any time to any part of the work where Mr. Hegeman thought it necessary. My general duties were under the direction 1130
of Mr. Hegeman. My particular duties had relation to track laying. I remember the crossing on the line known as the Minnaville Crossing; that was about five and a half miles east of the Missouri River bridge as near as I can remember it. The Missouri bridge was the western terminus of the line that we were building. This crossing was a crossing of the Hannibal and St. Jo. Road; an obtuse angle crossing. Some time in September or October, 1887, I cannot remember exactly which, I went there with a force of men to lay that piece of track south of the crossing—south or west of the crossing of the Hannibal and St. Jo. Road, including the crossing or from the crossing south, or west rather—it was west instead 1131
of south. After I got there, the first thing I did was to put in a connection with Hannibal and St. Jo. Road to go on to our right of way, to get our train on there. That connection was put in close to the Minnaville depot on the Hannibal and St. Jo. Road. That was between this crossing and the river, about a mile and a half west from the crossing. When I got the side track in I commenced laying the main track, and laid it as far as the grading was done towards the crossing. That brought us up to about as far as I recollect it now; it may have been anywhere between a quarter and a half of a mile. The

132 reason the grading was not done, as I understand, at the time, was that the right of way was not secured or that the location of the crossing was not absolutely made, and the track was not absolutely made at the time I went there to do that work. I understood that from the Chicago, Milwaukee and St. Paul engineer. When I got to this point that I have spoken of, a half or three quarters of a mile from the Minnaville crossing, I laid the track from there to the river bridge. I did not lay it between there and the crossing, because the grading was not done. The grading was not done because, as I was informed by the engineers of the Railroad Company, the location of the right of way had not been yet
133 determined. I do not know when that right of way was obtained, not to speak certainly as to the date, as near as I can recollect that, and the only way I can actually locate it is the fact that the engineer of the Company told me the day that I made the connection that the papers for that right of way had only been fixed up the previous day. We did finally make the connection at this crossing, two or three hours before the entire line was completed, so that the trains could go through to the bridge. So that when this connection was made it was the last bit of work that was done. I laid a few hundred feet of track north of that crossing, not to exceed 400 feet, made a connection
134 and tied the line up. And when that connection was made the line was complete from Ottumwa to the Missouri River. This grading was done on this half or three-quarters of a mile that I have spoken of when I was at Minnaville; they were working at the crossing, just about fixing it up. I have no absolute knowledge how long they had worked at it after they had obtained this right of way. I should say that they commenced at once, because they were not delayed by it. We were not delayed by the lack of grading when we got the right of way to lay our tracks. The grading was completed. We laid our tracks as soon as we got the right of way.

As soon as we got orders from the Hannibal and St. Jo engineer. The Hannibal and St. Jo people were making their change, and I made mine at the same time that they did, and made the crossing and connected the main track all the same day, as my recollection serves me at this date. When we finished this work the railroad had not completed its bridge over the Missouri River. They could not get into Kansas City then on their own line—not until the bridge was completed. The road was finished on either side of this crossing except this half or three-quarters of a mile before ever I saw it. I first saw it at the time that I went there to lay the track in September. I guess, by the looks of it, it was done the year before, for I had to dress a good deal of it before I could lay the track on it. It had been completed a long time before. During the six weeks or two months that I have mentioned from the time I got up to this half or three-quarters of a mile, and while I was waiting, I repaired that grade. The washout between Minnaville and the bridge and ballasted all that track between Minnaville and the bridge. I did all I could to hold the force together. When I could find nothing for them to do they would go. The only other delay that I have any recollection of was somewhat mixed as between Gault and the Chillicothe. There appeared to be a delay there on account of the yard location, as I understood it. There was a question as to where the yard was to be. Some three miles of track were afterwards laid according to my recollection at Chillicothe. That could not be laid until the question of the division terminal had been settled. I could not say exactly how long that question was unsettled, but, to the best of my recollection, it may have been two or three months. Our work was all done. All the rest of the work, except right in the Gault and Chillicothe yards. North and south of both yards was closed up and out of the way for a long distance both ways before these things were gotten in good shape, and before this question as to where the ter-

1138 minal was to be was settled. Before the tracks could be laid the yard was to be graded. Grading at both places was pretty heavy. I was last at Chillicothe Christmas, 1887, or New Year's Day, 1888; somewhere in that neighborhood. It may have been a week after the first of January, 1888. At the time I left, and shortly before I left, I saw some lumber in or about the yards of the Chicago, Milwaukee and St. Paul Railroad at Chillicothe. I could not tell you where; I could tell you where I did not see it easier; the lumber was scattered one end of the Chillicothe yard to the other. There was a part of it piled up at the east end of the yard; there
1139 was some in the north or west end of the yard; it was scattered so that a man, unless he went there on purpose to make an estimate, would not give an accurate estimate even by going through and looking at it; there was a good deal of it. There were some small piles scattered along the track. To the best of my recollection it was there when I left in January, 1888, except possibly what had been used by the Company. I do not know to whom this lumber belonged. I know that the Railroad Company used a lot of it. That was scattered; a great deal of it, I think the most of it, was in the east end of the yard. There was some little lumber I think scattered along different places; there was
1140 some at Liberty, and some at the big trestle at Liberty I recollect very distinctly; there was quite a good deal down there; I don't know how much, and there was some scattered along I know that never was picked up under the trestle, and there was some in the Liberty yard to the best of my recollection.

CROSS-EXAMINATION by Defendant's Counsel:

I had charge of the track laying along the whole line of this branch. I handled all the supplies from one end to the other, and laid some of it myself,

and had the general overlooking of it for the con- 1141
tractor, and I superintended the entire laying of this track. Gault is about 70 miles from Minnaville. We made the connection at Minnaville with the track from the north, in October, 1887, to the best of my recollection. The track was laid from Minnaville north to the crossing of the Hannibal and St. Jo. Road, and connected above something in the neighborhood of 400 or 600 feet of that crossing; the track was laid from the north. It was finally completed to that point from the north; as near as my recollection serves me now, it was the same day I made the connection. In other words, as soon as we were ready to make the connection at the St. Jo. Road we had completed the track laying from the 1142
north, so that the two came in together.

Q. What delay was there in the final completion of the track laying on account of this delay in fixing the right of way at Minnaville? A. That involves another question. That involves the question of the work east of that point towards Gault; it is northeast and southwest; that involves the question as to why we laid up at the Dwyer Cut; we laid up there about six weeks when we could have been track laying, if there had been any possibility of getting through. We laid up there, as I understand it, because we knew there was a delay at Minnaville; we laid up there, as near as I can recollect, close on to six weeks. I was taking some stock 1143
when I made that arrangement, to make that delay, in the river bridge not being completed; the impossibility, in my judgment, of getting the river bridge done soon enough to make it an object to do the necessary work and to have kept on track laying. The erection of this bridge was not part of Mr. Clark's work. His work ended at the east end of the bridge. All I know is that he was to finish his work to the east end of the bridge.

Q. Then the bridge had nothing whatever to do with your work in completing it to that point—in completing the road to that point? A. It did not

1144 have anything absolutely to do with it, only it was the governing point when I came to the question as to whether we would lay up or force the track laying to a certain point. I used the fact that that bridge would not be completed to suit our convenience in track laying to a certain extent. The delay in the final completion of our work by this delay in fixing the right of way at Minnaville was six weeks, without a doubt. Six weeks we laid up, because I thought the bridge would not be completed in that time. I took my chances on that. If the right of way at Minnaville had been determined six weeks before it was, there is no reason why we would not have been ready at that point with the track laying
1145 on the northeast to have made connection. But we laid off on account of the bridge not being completed. We took our chances on that. If they had had the question settled sooner about the right of way at Minnaville I would possibly have miscalculated. It took us to do that when we got at it only a short time, possibly ten days. It took us a day to lay the track over that point where there was this question as to the location. The distance was from a quarter to half a mile. While waiting for that to be determined we repaired some washouts between Minnaville and the bridge, that is, the material in the fills along the Missouri. We couldn't have finished the road down to the St. Jo crossing,
1146 because the engineers would not let me. It was an utter impossibility for me to finish our track until the St. Jo people had finished their track and made connections. It would not be worth while to finish our track down to the point where the connection should be made, because it was not necessary to go out and monkey, laying three or four rails at a time when you could do all in one day; it costs money to do those things; when you take a gang of men out you have got to pay them, and there is no use going out for a day's work. The reason why I couldn't have brought that track down from the northeast to the point where there was a dispute as to where

the right of way was during the time I say I laid 1147
these men off was that there was another force doing it. I presume they were working right along as fast as they could; I was not there. There was a delay in laying the track from the northeast down to this point of six weeks at the Dwyer Cut. I could not tell you exactly how far from Minnaville; it was between Gault and Minnaville somewhere. They waited there because I thought we would take the chance of the bridge not being finished. I knew that the bridge could not be finished, and therefore we were not in any hurry to do the work. I knew that there was no reason for forcing it; that there was no reason so far as the building of the St. Paul Road was concerned and the running of trains. I 1148
did not get any instructions to lay off from anybody. If we had wanted to we could have come right through and had this track laying down to this point at Minnaville done six weeks before it was. There was some unfinished work on the road after October 27, 1887. The surfacing was not finished in October, quite. It was done after the track was laid; just when, I could not say. I don't know of very much else there was undone after October 27, 1887. There were some side tracks to be finished up yet, and they were finished after that date. The work we did after that date, with regard to track laying, I took my men that I had and put in a lot of cross-covers the 1149
whole length of the line along the side tracks; they were extra work that had not been determined on, and were not put on or not ordered put in when the tracks were originally laid. Those side tracks that I did, then putting the cross-covers on those side tracks, I finished at the points designated by the engineers. To my knowledge there was not any regular work that was not extra work, unfinished after October 27, 1887, except as there is always a little finishing up and touching up to be done at different places that the engineers want done before they finally accept the work, and the depots had to

1150 be located, and after the depots were located and built, then they determined on the side tracks. They could not be put in when the track was laid, and those things had to be done. They were extras, as far as laying the main line is concerned; I presume they were part of the main contracts; I don't know. I know a lot of that work was being done, side-tracking, and things of that kind; I put in two or three weeks about, I guess. When I went to Chillicothe, in the lumber yard I saw a lot of lumber lying on the south side of the yard; that was principally, as I remember, odd lengths, 12 x 12, and some ties, and possibly a few stringers. There was not any of it but what could be used in the right
1151 place. It was all good, clear, sound timber; it was odd sizes, but it takes odd sizes to build bridges; you cannot build them out of one size. I looked at it every time I passed through the yard, possibly for three months; three or four times a week for three months; and there may have been 15,000 or 30,000 feet. I would not say there were over 30,000 feet. I don't know to whom that belonged of my own knowledge. The last time I was there was about the first week of January, 1888. Van Aiken and Guilfoil took it to the yard. I saw them take it there, load it and unload it. I saw them unload some of it, not all. These men were contractors for Clark. The last grading that was finished, that I
1152 remember accurately, was at the Dwyer cut. That must have been in August, 1887.

REDIRECT-EXAMINATION:

I say the work was substantially all completed when the connection was made at Minnaville. The balance that we did was putting in some cross-overs and extra sidings. It was work that had not been ordered done when the sidings were put in. Some of the sidings had not been located up to that time. Some of them had been. As to the ownership of this lumber, I saw it brought there by Van

Aiken or by Clark. It was lumber brought there to 1153
be used in the construction of the road, and it was lumber left over after the road was constructed. Mr. Hegeman bought the lumber. If the Minneville crossing had been obtained, the fact that the Dwyer and Huntington excavation at the cut had not been finished would not have delayed the finishing of the road at all.

When it was found that the Minnaville crossing could not be obtained, there was a change made with reference to the Dwyer and Huntington Cut. We simply stayed up there and did not do anything, so far as this track laying was concerned. We went on and took the bottom out of the cut, and after laying the track on the rock bench, as it 1154
was proposed to do, they completed the excavation down to the grade. There was no delay there; no delay was occasioned in the finishing of the work by this fact. Had the right of way to the Minnaville Crossing been obtained we would have laid the track on the rock bench at the foot of the earth slope, and that would have left room enough for us to have completed the rock excavation, and when that was done we would just shift the track. The grade south, or rather west, of the Dwyer and Huntington Cut, from there to Liberty and from Liberty down to Minnaville Crossing, was completed. So that the only thing that was in the way of the completion of the road was this Dwyer and Hunt- 1155
ington Cut and the Minnaville Crossing. The Dwyer and Huntington Cut did not delay us in completing the road at all.

RECROSS-EXAMINATION:

We made the arrangements about laying the track on the rock bench with Mr. Johnston's foreman, that is Mr. Clark's sub-contractor. The railroad company's inspector was cognizant of what we were going to do and agreed to it; that would have been just simply a temporary expedient for laying

the track; the road would not have been finished until the track had been laid on the track level, what you would call the grade level; and this rock bench would have been above grade from 6 to 12 feet possibly. There would have been a gradual rise from the bridge to the cut down on this other side following the dip of the rock. This Dwyer cut was nearly half a mile through, I remember, for the space of about a third of a mile the track would have been 10 to 12 feet above grade. The road would not have been completed until we had cut this rock bench down to the bed of the road, still it would not interfere with their transportation over it with fast trains as fast as they had on it. It was our work to lay the track according to grade down to the bridge, that is what we started out to do, and that is what we would have eventually done, even if we had laid this down on the rock bench. This arrangement I speak of with the track inspector of the the road was simply a temporary arrangement, that was the understanding, and we were to go ahead finally and run the road according to grade through this cut; as far as I know we were.

FRANK E. HOUSE, a witness on behalf of plaintiff, testified as follows on DIRECT-EXAMINATION:

I reside in Beaver, Pennsylvania; my business office is in Pittsburgh. I am a civil engineer and have been for nineteen years. I was connected with the Chicago, Milwaukee and St. Paul Railroad in a number of capacities. In 1887 and 1888 as division road-master, and right afterwards general road master. In 1887 and 1888 I was located at Chillicothe, Missouri. I remember the Chillicothe yards at Chillicothe, belonging to the Chicago, Milwaukee and St. Paul road. My duties extended as road-master from just north of Chillicothe to Kansas City, or to Coburg, as we call it, just outside of Kansas City. That was across the Missouri River, including the bridge. I remember of lumber and

material being in the Chillicothe yards in the year 1159
1888—along up to June or July, 1888. A man by the name of Lewis Besse had charge of that lumber, and as lumber was needed by me on the road it was furnished to me by him. I remember that there was some timber in the yard that we were told belonged to the contractors. I remember very distinctly of large washouts; my impression is that it was in 1888; it was in June, 1888, I think; at a number of different points. We had washouts between Chillicothe and Dawn, and between Dawn and Ludlow, and between Ludlow and Bramer. The repairing of these washouts was under the direct supervision of the superintendent of the division. I had direct charge of it for him. There was some 1160
timber used in the repairing of these washouts. Quite a large amount—a good many sticks. A good many sticks of irregular sizes—anything that we could make use of. My present recollection is that at that time I knew it came from Chillicothe—just whereabouts I cannot tell.

CROSS EXAMINATION by Defendant's Counsel:

I really could not say how many feet of timber we used in repairing these washouts; we used long timbers; I remember distinctly that some pieces that were used were 12 x 12 and about 40 feet long. I could not give the aggregate amount. When I say that I understood this timber came from Chilli- 1161
cothe, I mean that the timber was loaded each day there in the Chillicothe yard, and sent to us at the washouts as we ordered it, as we needed it. I would order it or the superintendent would order it. When we ordered it we ordered direct from the Chillicothe yard from this man that had charge of the timber, Besse, that is, it was arranged in this way, the superintendent of the division, who was the man in charge, lived in Chillicothe and Besse was the master carpenter, who had charge of the timber, &c., and each night when we would come in from the washouts the superintendent and I would

1162 have a conversation about what we might need for the next day, and it was ordered that Besse load it. All I know is that we sent to Besse for it and it came to us. I am not positive that that lumber that was said to belong to Mr. Van Aiken was in that place in the yard in June, 1888. I could not tell about how much timber was stored there altogether. I could not give you even an approximation of it, because the stock varied; we always used that for the Company's storage yard, and we had timber coming in and going out all the time; the whole ground in there was used as a general storage place for lumber. I have no knowledge of my own that the lumber I speak of belonged to Van
1163 Aiken or to the contractors. I could not give any general idea as to whether there was five, ten or twenty thousand feet used in these washouts; it must have been more than 5,000 feet. I could not give any evidence on that that would be worth anything; I do not remember anything to base it upon. We used a great many ties, &c., I know. We used a great many track ties. In what part of the yard the so-called Van Aiken lumber was located, I do not now remember, nor do I remember the quantity; there was some there said to belong to him I remember. It was impressed on my mind, for this reason that whenever there was any timber to be used, I remember quite distinctly that we were not
1164 to take any timber that was said to belong to Van Aiken. I do not know as a matter of fact, whether that was taken or not.

HEMAN CLARK, recalled in behalf of plaintiff, testified as follows:

I remember sending a telegram in answer to the one from Mr. Miller of February 23, 1888, asking if Mr. Hegeman was authorized by me to make final settlement on my contract with the Railroad Company for constructing the Kansas City line. I have not been able to find any copy of it. Substantially the answer to that telegram was that Mr. Hegeman

was not authorized; that was the language of the telegram; that Mr. Hegeman was not authorized to settle and finally adjust accounts for me. I recognize my signature to Defendant's Exhibit No. 36, of January 25, 1896. At the time that I signed this paper, I had not received any final accounts from the Chicago, Milwaukee and St. Paul Railway Company, or any of its officers. I had not received any account covering the items of the payment which was made under this receipt. I had no personal knowledge of the correctness of any of the figures contained in this receipt.

Objected to as immaterial, irrelevant and incompetent. Objection overruled. Defendant excepts.

I had, prior to the obtaining of this money, had an interview with Mr. Miller. It was here in New York. I think it was in my office. I had an office the next floor above the St. Paul office, at 40 Wall street. I should think it was six or eight days prior to the signing of this receipt. It was prior to the receipt of that telegram of February 23, 1888. Prior to that time I had been making efforts to get the money that was due on this contract, but they were largely made through Mr. Dumont, who had been an officer in the Company, and who was then a broker, who was carrying an account for me, and who wished to have me pay some money, and I wanted to pay it on that account, and he very kindly offered to do what he could, as he knew Mr. Miller very well. I think I had previous to this seen Mr. Bond in regard to it. At this time that I saw Mr. Miller I had a conversation with him in regard to obtaining the money and the accounts. Mr. Miller said that he was going back West, and he would have the accounts all made up. I think he said they were in process of adjusting, and had been some time, such matters as they could, but when he got there he would have the accounts made up, and

would send me either a final estimate, final payment, or he would send me a good large check on account. He thought he would be on himself. And he spoke of the various things that would be adjusted in a satisfactory, business way. I said I would like to sit down with him and go all over the various matters that had accumulated during the period of construction. He said he would be glad to do so; would do so. I had a talk with him about the question of nut locks then. There were several things mentioned which were in my mind; nut locks were amongst them. He said he conceded we had a good claim for nut locks; he said it was clearly extra in his mind; he said the nut locks were an extra matter, and should be paid for.

Q. Did you know that in this receipt these nut locks had been kept out of your payments?

Objected to as immaterial, irrelevant and incompetent. Objection overruled. Defendant excepts.

A. No.

Q. State the circumstances, as near as you can remember, in regard to your signing this receipt; where it was signed, and how you came to sign it? A. I think Mr. Bond's version is pretty correct. The receipt was sent up to the office, I think, just as Mr. Bond says, by a clerk, and was laid down on the desk, with a check. The check was foremost in my mind, because I was terribly hard up and wanted money, and I simply signed the paper as it was laid down there, and the boy took it up and went off. He did not leave a copy, and I never had a copy of it until it was shown to me by Mr. Hegeman. I did not read it over carefully. I relied, if there was anything wrong in it, upon Mr. Miller to right it on some future adjustment. He said he would adjust all these matters. We had a previous conversation before he left for Milwaukee, and a reasonable length of time after that this check was forwarded. I did not not

notice, in this receipt, that there was a penalty of $40,000 inflicted; I paid but very little attention to the receipt. I picked up the check and signed the receipt, and the boy went out. I had had no agreement with him or anybody else, in any conversation or in any writing, whereby I had consented to their keeping out $40,000 for different things, as contained in this receipt. I had no conversation in regard to their keeping out any sum of that kind. I did not know, at the time of the signing of this receipt, anything about the condition of the obtaining of the rights of way and the time they were procured. I knew nothing about that until Mr. Hegeman came back afterwards and he asked me what sort of a receipt I had signed. I said, "I don't know." He said, "I will get a copy of it when I go to St. Paul." That was after this receipt had been signed and I got the check, and when he came back from the West. He was particularly anxious to know what I had done, and I was anxious to know what he had done out there, what he might have said. Some of these matters were taken up by the Railroad Company after this receipt, so I was informed by Mr. Miller. He came on here, and I saw him, He said he would refer the whole matter to his proper Board, I think the Executive Committee, at a meeting, and have it all considered. This was long after this receipt was signed. After the meeting I saw Mr. Miller, and he said the matter had been brought up to the Board, and through the advice of their counsel, the committee or officers who it came before, were of the opinion that the receipt was strong enough to bar me from any and all claims. In talking further, I said, "That is an injustice." He said, "I know it is. You have got claims there that are equitable, I think, and I would like to see them adjusted." After this payment of money to me by Mr. Miller or Mr. Bond rather, by the check, I discovered that I had been docked out of that money, the sum of $40,000 for time allowance. Upon the arrival of Mr. Hegeman from the

1174 West—I think it was a month or two—he asked me for a copy of the receipt. I said, "I have not got it." He said, "I am going West and I will go to the office there and get one." I never saw this receipt until just before this suit was brought. I did see a copy of it. Hegeman got it out West and brought it back here.

By the Referee:

Q. What notice did you give the Company, if any, or Mr. Bond, verbally or in writing, after you discovered that they were claiming to dock you, that you objected to it? A. That was with Mr. Miller. Perhaps I talked some with Mr. Bond, and he in a
1175 very pleasant way said, "I have but little to do with those western matters." Afterwards I said to Mr. Miller—I couldn't say when. Whenever he came to New York I would hunt him up and plead my case as best I could, and I can remember only fragments of the conversation.

Q. I would like to know how soon you gave notice, by conversation with Mr. Miller or by writing, or with Mr. Bond, or any of the chief officers of this company, that you didn't intend to be bound by that receipt? A. It was along in stages. The first was when I saw Mr. Miller, and he kindly took the matter up and went before his board to adjust it. That was after this receipt. I couldn't say how long
1176 after this receipt; it was within a year; less than that.

By the Referee:

Q. I didn't refer to the $40,000, except for the purpose of identifying what I was driving at, any more than the nut locks or anything else. You have testified that when the receipt came up to you you signed it without reading it, and accepted the check; and it ran through my mind that the moment you came to discover the amount of the check, or think about it, which certainly must have been within a

few hours, I would like to know what you did? A. 1177
I had no final estimate, and I had no amount fixed in my mind. I never had a final estimate; I never saw one yet, unless it has been shown here some time.

CROSS-EXAMINATION by Defendant's Counsel:

I have been a contractor for building railroads, and other works, to a very considerable extent, before I took this contract on the Chicago, Milwaukee and St. Paul road. I built eight or nine hundred miles of the Northern Pacific; very much larger contracts than this one. I built a road in the South and a road in Nova Scotia. I built the Boston Water Works. We had only part of it. I suppose it 1178
amounted to about $1,500,000. I was engaged in other contract work at the time I took this contract here; the aqueduct here; a large portion of that. That was a contract involving several millions of dollars. The aqueduct contract was with the firm of O'Brien & Clark. I also had two sections in my individual name; but it was thereafter merged into the firm of O'Brien & Clark. That involved a very large amount of money. I don't remember that I told Mr. Miller, in response to this telegram of February 23, 1888, in which he asked if Mr. Hegeman was fully authorized to make final settlement, to send the account and statement to me and that I would make the settlement. I told him that Mr. 1179
Hegeman was not authorized to make the final adjustment of accounts. I meant by that that he was not entitled to give a final receipt. I mean that that is a part of it. That he was not entitled to receive the money or to finally agree on the important items of that contract. I wanted Mr. Miller to send the check to me to make the final payment to me here in New York. I was the contractor. I think that all payments on this contract were made to me here in New York, I think so, largely. I don't know that none of them were made to Mr. Hegeman. I am inclined to think some of them

1180 were. Generally I presume everything was made to me as the work progressed, and all accounts or statements of amounts charged to me for material furnished should have been rendered to me, but they were not rendered to my office here in New York. I didn't have an office in New York where the records of this work were kept. When I sent out there and asked for any statements of the amounts paid to me and the amounts charged to me I got it, a balance sheet through my bookkeeper. I had my debit and credit account. I furnished money largely in excess of what I received from the road, hundreds of thousands of dollars to my disbursing office on the road, remitting money to them. When
1181 the monthly payment came due the St. Paul Company would send me a check for work done say the previous month. I had no voice in that check, or in the making up of it. It was determined by the Chief Engineer. I wouldn't say that it was as provided by the contract. It was simply determined by him. I don't know that it was authorized by the contract that the Engineer should make monthly estimates. I don't think the contract reads exactly that way. That I advanced a very large sum of money before I got any estimate, covering a great many months. The monthly statements were not sent to me at any time of the amounts, made up by the Engineer, that were due in detail, or any way
1182 except I think nothing but a voucher stating that so many dollars of work had been done the previous month without explanations what it was for and the amount of it, and so on. The contract, in article 15, provides that as soon as practicable after the 15th day of each and every month from and after the commencement of the work agreed to be done, the Chief Engineer shall furnish to the first party a certificate and estimate of the total amount and value of the various kinds of work done and material delivered in the work or on the first party's grounds up to the 15th day of the month. I knew that. I presume that that was done. The contract also provided

that about the first of the month next ensuing the first party shall pay to the second party the total amount of the said estimate, less the amount theretofore paid on account of any previous estimate, and less the amount of $500,000, which the party of the second part has hereinabove, in Section 1 of Article 11, agreed to invest and to keep invested in labor and material for the construction of the railroad until the full and final completion thereof. Those are the payments I refer to as having been made; I presume those were made to me in New York in each month. They were made, as I remember now, with very good regularity. There might have been some months when they didn't pay promptly. Mr. Hegeman had charge of the work of construction under this contract. The contracts with the sub-contractors were drafted by me, and printed and sent out to Mr. Hegeman. All those contracts were executed by Mr. Hegeman on my behalf, or by Mr. Woolfolk, I don't know which. Mr. Woolfolk kept the accounts concerning this work. He had been with me for about twenty years, kept the accounts until nearly the close of the work, and then Mr. Gridley did. My books of account of this work are here. I will produce them, such as there is left of them. I have been hauled through fire, you might say, for eight or nine years, with the various firms, and a great many of my papers have been seized at different times. I mean by being hauled through fire, financial trouble, receivers and all that. My firm has been in the hands of a receiver. They were for a limited period. I don't know just exactly what time. A couple of years. The Railroad Company didn't render any statements of account. The monthly records of the progress of the work were rendered out there to Mr. Hegeman, so that he could adjust the accounts with the sub-contractors, and they were kept there, and I presume they are still in his possession. They are unimportant documents; they are simply details of each month. They have never been furnished to me or turned over to me by

1186 Mr. Hegeman when the work was done. I had no use for them. They are nothing that you guaranteed to go by or stand by. They were approximate. Monthly estimates I think were furnished out there. I don't know that. Monthly estimates were not furnished here to me. They were not sent to me by Mr. Hegeman. I don't know what amount my books show as received by me as payments on account of the contract and for amounts charged to me, for the construction of this road. The books will tell that. The amount stated in that receipt as the amount paid to me by the Chicago, Milwaukee and St. Paul Railway Company, to apply on the contract, in money, material, labor and transporta-
1187 tion, is not correctly stated in this receipt as $3,626,-865.20, because it don't state as much as there was fairly due me. I didn't know whether the statement in this paper, "Whereas the said Chicago, Milwaukee and St. Paul Railway Company has paid the said Clark to apply on said contract, in money, material, labor and transportation, the sum of $3,-626,865.20," was correct or not. I don't know that it is not correct.

Q Didn't you say that Mr. Miller brought you this receipt? A. In my former testimony it was impressed on my mind that Mr. Miller was here at the time of that payment, that receipt. I said that he brought me the check; but I thought he did.
1188 My impression was that Mr. Miller brought the check. I think Mr. Bond's statement of that was correct. I think the check was sent up, just as Mr. Bond says. My conversations were with Mr. Miller in regard to these matters, and I naturally thought so, and after such a long time I had forgotten that part. My statement now is that Mr. Bond is right; that the check was sent up from his office by a clerk and thrown down on my desk in the manner which I have just explained with the receipt, with that paper. I am quite sure that the check was brought at the same time the receipt was. It is my recollection that the check was already made out

when the receipt was brought. I was expecting the 1189
check, or the final estimate or statement of accounts, such as I was entitled to, or expecting to see Mr. Miller. I don't remember that I had a telegram from Mr. Miller at about this date, stating that he had sent the voucher to Mr. Bond. I had been previously applying for a settlement, and failing to get that, as large a check as possible on account, to relieve me.

I do not remember Mr. Miller stating to me, at any time, that he would withhold further payments until final completion of the work. I think I spoke to Mr. Bond about getting money, as I naturally would, with a large sum due and the work done. If Mr. Bond says he made two payments of $100,000 1190
each to me, I think he did. If he produced my receipts for them, that goes. I haven't any doubt about that. I have no doubt I did tell him that I was in urgent need of money, because that would have been the truth. I don't know that I received this telegram from Mr. Miller, dated Milwaukee, March 7th: "Heman Clark, New York; voucher mailed to Mr. Bond to day." I wouldn't say that I did not. I was very hopeful that some voucher or some statement from Mr. Bond would come about this time, because I needed it. I don't remember who brought this receipt and check to me. I think now it was the office boy from down below, from Mr. Bond's office. I am inclined to think that Mr. 1191
Bond's account and version of that is correct; I don't think he is correct that the check was not sent to me with the receipt; that it was sent to me afterwards. My recollection is that the check was put right down on the desk, and the receipt, too; before the receipt was signed. I should repeat, as I said before, that my recollection is that the check and receipt were sent up from that office together, and put on the desk. I didn't read the receipt sufficiently to get the sense of it. I just simply glanced at it. I was relying upon Mr. Miller. I knew that it was a

1192 receipt for $173,532.49; I had signed, I think, as Mr. Bond says, one or two receipts with perhaps a similar voucher; it might not have been as large as that. I didn't read them. I did not understand that this was a final payment. I didn't say before that this was a receipt for a final payment, in my former testimony. I don't remember that I used those exact words.

Q. You said, "I signed a receipt for a sort of final payment." That is what you understood it to be, didn't you, a sort of final payment? A. It was spread before me, as I say, in that manner; and I was anxious, and needed the money, and I simply signed the thing and took the check, as I remember.

1193 I did not understand that it was a final payment, with the exception of the sum of $40,000 reserved to meet claims. I did not know that $40,000 was taken out to meet claims. I don't think I saw that on the receipt, because Mr. Hegeman questioned me, and I did not know it until he got a copy from the West, and he said: "In that paper you have waived this business, and the right of way was not obtained until after your contract was legally expired by the terms of it." I didn't know that this receipt contained a statement that "Whereas, a final estimate has been made by D. J. Whittemore, Chief Engineer of the Chicago, Milwaukee and St. Paul Railway Company, of all the work done and material fur-

1194 nished under the contract made between said Railway Company and Heman Clark,. bearing date March 6, 1886, for the construction of the railroad from Ottumwa, in Iowa, to the Missouri River, including all extra work performed and material furnished of every kind and description, which estimate, with the proper monthly estimate, less deductions made for work not done and work assumed by said Company amounts to $3,895,798.79." I didn't read that. I didn't know that it contained that statement. I say that absolutely. I only casually glanced at it, and not enough to get the meaning of the writing there. I don't know that that is the

amount that I claim was earned under the contract. 1195
It is wrong if it differs from our claim that we now make here. It is not the amount that we now claim. It may be a part of the amount. I think we claim additional amounts I won't say that I saw that there were figures there that brought down a balance of $173,532.49; I saw the check which called for that amount, and I took it. I mean to say that I signed a receipt for this amount, without seeing that it corresponded with the check. I didn't examine into that matter. I took it for granted that they were doing business in a proper way, and I relied upon their integrity in regard to these matters. I did not know that I was credited in this account, in addition to the amount cer- 1196
tified by the Chief Engineer as the amount of work done under the contract, for materials sold by me to the Company, rebates and other matters. I did not go into the account thoroughly enough to arrive at any conclusion of that kind. I told Mr. Miller, as I said, by telegram, that Mr. Hegeman was not authorized to settle the account. I meant by that that I was the person to settle the account; and Mr. Miller said that we would sit down and settle it. He sent me this statement through Mr. Bond. I didn't know that these two amounts stated to have been certified by the Chief Engineer, $3,895,798.79 and $34,598.90, amounted to $3,930,397.69. Not at that time. I
didn't compute that. I do not know what I have 1197
sworn to as earned under the contract and for materials sold by me to the Company. I couldn't tell you unless I refresh my memory from the complaint itself. I can't tell whether it is not the fact that the amount which I have stated in the complaint as the amount earned by me for work under the contract and for materials sold by me to the Company, $3,930,397.69, is the same amount which is stated in the receipt. Part of that was paid by an evasive receipt. It was not paid by real money. I presume I know that by the terms of the contract I was to

1198 be charged $50,000 for transportation. I did not know that that was deducted in this statement attached to the receipt. I can't tell without making a comparison of both. I knew that the contract provided that I should save the Railway Company free and harmless from all claims that might be made against it for liens of workmen and claims of sub-contractors, and from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle, and from all damages for cattle or other domestic animals killed or injured, and from all damages suffered by said sub-contractors and employees while engaged upon said work. I knew there were claims pending against the Railway Com-
1199 pany for damages of this kind. I was advised of it. I knew there was a suit by King & Wetherill for some $23,000, one of my sub contractors. I did not know, at the time I signed the receipt, that there had been an agreement or understanding that $40,000 was to be deducted from the contract price if the road was not completed by the first of June, 1887. I know early in the case that Mr. Miller wished such an agreement as that; but Mr. Wadsworth, who was in supreme command, swept it one side, and we went along without it. That is my recollection of it. There was not to be a difference of $40,000 in the contract price if I had until the first of August, 1887, instead of the first
1200 of June, 1887, to finish the work. Not as the contract was finally agreed and signed; that was left out. There had been no such an understanding. Mr. Miller wished to make it a matter of contract. I went to Mr. Wadsworth about it, and complained that a great deal would hinge upon that. Mr. Wadsworth said: "Did you ever know of a liquidating measure of that kind being collected?" I said "I never did. I never engaged in many contracts that had them in." He said "I guess there will be no trouble about that. We will waive that." And you will find that the contract as finally signed here in New York was amended to cover that point, and I

think some other points. I don't think I did after- 1201
wards have any correspondence with Mr. Miller about it. I think Mr. Miller wrote me there, or telegraphed or something. I don't know what it was. I think I referred that to Mr. Wadsworth. The business was run at this end of the line; it was not out there. I don't know who Mr. William C. Edwards was. I see the name attached to my receipt William C. Edwards. I don't know who he is. I don't know how he came to put his name there. He might have been told to. I don't know whether he was told to or not. I did not ask him to put his name there as a witness—not that I remember. I don't know why I should. I don't recall anything of that kind. He was not a clerk in my employ, or 1202
in Mr. Dumont's office that I know. I don't know anything about it. I don't remember now that I ever heard of him.

Q. (By the Referee.) Was not this the name of the boy who brought up the check and the receipt? A. Very likely. I don't know. I think Mr. Edwards was the person who brought up the check and receipt. If you want my opinion I should think so. Still I don't know. I don't know that the person who brought up the check and receipt signed his name as a witness. It was all done in a moment, seven or eight or nine years ago. (Check shown witness.) This is the check that I received at that time. I should say so from all appearances. I haven't any 1203
doubt about it. I believe that is the check. This check (marked for identification B, April 26, 1895, and admitted January 11, 1896) is endorsed by me. I can't tell what I did with it. I had a thousand uses for it. The stamp on it says it went up to the Mount Morris Bank, and I have no doubt it did. If it went there it was deposited to my credit, and it was collected and paid. No doubt about it. I knew that Mr. Hegeman had been out to Milwaukee going over these accounts before this voucher came to me. I think it was a sort of continued process of adjusting all along. There were two de-

partments, and there was a vast business done between them. I can't say that I knew that Mr. Hegeman had been out at Milwaukee, with our bookkeepers or his bookkeepers, adjusting these accounts. I presume he was there at various times adjusting these various amounts. I don't know that he had been out there just before this receipt was signed. I think I did not see Mr. Hegeman at any time before this receipt was signed shortly before. I think it had been quite a long time before. I think that Mr. Hegeman would write me about various matters, and I would instruct him, and no doubt I instructed him to adjust accounts and keep adjusting them, and struggle along to get together if possible with their Construction Department and with them, so that the slate might be clean. He has an interest in the money that I claim to be still due under the contract. It is not much. In explanation of that I will say that he did make a claim to me that he had understood me that when the contract was done I would give him something more than a salary; and when this matter came up and he explained about the right of way not being obtained in time, and that I was entitled to these various sums which we now sue for, he asked if I would give him an interest in it if it was collected in the recovery—an interest in what I should get out of it. I said I would. We settled it in that way. We never agreed on any figure. I did tell him he might have an interest in what might be got out of it in this recovery. I made complaint to Mr. Miller that this receipt was incorrect at various times. We discussed it and he agreed to look into it and did call his Board together. One grievance I had was that the Company very quickly responded to defend these sub-contractors for excessive excavation. I said to Mr. Miller: "You run along for a time when you drop the whole thing and say we are going to pay it. You lie right down and you have no further chance and we are going to pay it out of your money." That was the King & Wetherill suit.

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You will find that they took my money subse- 1207
quently and paid it and stopped their defense.

Q. Did you ever, anywhere, at any time, make any communication to the Railway Company, or any officer thereof, as to any item or amount that had been deducted from the statement, as stated in this receipt? A. I discussed the whole subject with Mr. Miller. The subject at issue here, the contention. I discussed the matter, as I just told you, of the King & Wetherill matter—about the claims of sub contractors, and about their taking my money to pay an excessive amount of work that they would not certify to themselves. That was in 1890—I think it was about 1890. The King & Wetherill matter was not the only matter I discussed with 1208
Mr. Miller. I discussed the nut locks and he said that was a tenable claim and should be allowed. That was after the receipt. I communicated to the Railroad Company through Mr. Miller, who I thought was the proper official that I considered the receipt erroneous. He was the only one I did business with. He promised to attend to it. The nut locks and the $40,000 items were both questioned, not the $40,000 to meet claims, but the other allowance. I said that from evidence I had found out the right of way had not been procured until after the limitation of this contract. I said: "You wouldn't hold me to anything like that?" He said: "I don't know about that. I understood there was 1209
something said about a $40,000 limit. It is in the contract, is it not?" I said: "No." I knew it when it had been deducted, when I got hold of this receipt and when I talked with Mr. Miller. I couldn't say when that was. It was after I had a full knowledge of the contents of that receipt. I acquired that full knowledge through Mr. Hegeman. He got a copy out West. I do not remember when. It was before I had this talk with Mr. Miller that I have been talking about.

1910 HEMAN CLARK, further CROSS-EXAMINED by defendant's counsel, testified as follows:

There was nothing specially to prevent my examining and reading this paper that was brought to me by this Mr. Edwards, to be signed. The clerk was there. He seemed to be in a terrible hurry. He came rushing in, and stood waiting. I don't remember that there was anybody else there right at my desk. I think there were others in sight, however. I say that I only glanced at it casually; not sufficient to get the meaning of it, because on previous payments, I think, if you find their vouchers, you will find that they are similar, a lot of writing, and they are
1911 signed and they took them. I could not say what they were. I glanced at the part just before my signature at the end of it, but, as I say, not enough to get the meaning of the paper. I have had very large transactions as contractor.

Q. Have you been in the habit of signing papers of this character without reading them? A. I think I can safely charge myself with carelessness in regard to those things. I am careless; always have been.

I cannot fix the time of this conversation with Mr. Miller, that I referred to, prior to the signature of this receipt, any closer than I have. It was a very short time before the remittance; before the
1912 9th of March, 1888. I wouldn't say that it was during the month of February, 1888. My best recollection is that it was eight or ten days; it might vary from that to fifteen; before the 9th of March, 1888; before the remittance came. It was here in New York that I talked with Mr. Miller; I think I talked at my office, and I think I talked at his. I think I talked to him on the street. The one that is most impressed on my mind was in my office. He came in there to see Dumont, I think, occasionally. He did not come to see me. I don't remember how many times he had been there between the previous

first of January and this March. I should say he 1213
had been there three or four times. I was very anxious for money, and we discussed this matter. The unpaid balances, and general matters relating to the road; in reference to a final settlement, I mean. As near as I can remember, we would take up one subject at a time. For instance, the nut-locks. He said it was an equitable claim. He didn't make any protest whatever against allowing it. That was before this receipt was brought on—before this check. I can't remember all we said. We talked probably hastily, and wound up by his promising to go on and what matters were not adjusted have them adjusted, so that he could send me a final estimate and final payments, or payment on 1214
account, if he did not come on himself. He thought he would be on himself. He was here then, certainly. He said he would come on with the account. Unless I heard from him otherwise; unless there was a final estimate came on with the final payment. I don't remember that I did hear from him otherwise; I think not; unless you could say that the remittance was hearing from him. I don't remember that I heard from him that the remittance would be sent on. I can't remember that I did. I can't rememder that I had any communication with him about it, not between the time he left and the arrival of the check. I could not fix the date when I first saw him after this paper was 1215
signed. I can't fix the time when I got a copy of the receipt. I first knew that nut-locks had gone into the track some time during the construction. Laying the rails was the last part of the construction. There was a large amount of rails laid on some part of the road before other parts were graded. I first knew that they charged me with nut-locks through Mr. Hegeman. Mr. Hegeman's statement to me was that Mr. Miller stated that they should be paid for. I rested on that. That they were an extra matter, not contemplated in the contract. That was Mr. Hegeman's explanation to

me and he said they so considered and conceded it. Mr. Miller also told me so afterwards. I had a conversation with Mr. Miller about it during the progress of the work. It was my belief, until I heard or read Mr. Bond's testimony, that I got this receipt from Mr. Miller—this check and receipt. I had an impression, from the fact that I saw Miller before and after, that he attended to the whole matter; but so many years had passed over that I think Mr. Bond's version of it is correct, so far as relates to the check and receipt. I think it came up from his office as I described. My recollection about it is clear since thinking it over and hearing what he said. It brings certain recollections to my mind, that is, certain facts. As I say, I think so much time had elapsed I didn't have a very clear recollection. I wished to correct the impression that I had. I am not very strong in the belief that this Mr. Edwards brought me the check. I find Mr. Edwards' name subscribed or on the receipt as a witness, and I have reason to believe that perhaps he is the man who brought it from that circumstance only. I did not ask him to sign his name as a witness, not that I know of. I do not say I did not. I don't remember asking him. I say I did not know Mr. Edwards. I don't remember him now. The clerk there was Mr. Taggermeyer, I believe, and there was an office boy. Whether Mr. Edwards was the office boy or not I don't know. I couldn't tell you whether it was Mr. Edwards who took the receipt back to Mr. Bond. I supposed at the time this receipt was signed and I got this check that all the work was done, and I was expecting a final payment on account of the contract. It was time for it, and I naturally expected it.

WILLIAM W. HEGEMAN, recalled for further cross- 1219
examination by defendant's counsel, testified as follows:

I have never said there was a final settlement in February or March, 1888; no settlement was had at that time. There was an adjustment and ascertainment of the amount that had been earned by Mr. Clark under the contract, so far as formal matters in the account. I did not object to Mr. Clark being credited with anything that is added to the contract price in the engineer's certificate. Almost all these things were covered by supplementary contracts, and largely they are what I refer to when I say formal accounts. They were deviations from the
original contract, and agreed to by both parties, my- 1220
self on behalf of Mr. Clark, and Mr. Kimball, or Mr. Miller, or Mr. Whittemore, or whoever it might be, on the part of the Company. Some time after this accounting at Milwaukee, in February or March, at which the amount which had been earned by Mr. Clark under the contract was determined, I came to New York; sometime about the early part of March, 1888, the first week possibly, or about the 10th of March. I saw Mr. Clark at that time. I had heard about a payment being made, and I asked him about it. I knew he had got a payment on account. I don't recall that the amount was stated at that time. It is ten years, you know, and I don't recall it.

1221

REDIRECT:

I have weighed the National Nut-lock to see how much it weighed. It weighs 443 grains avoirdupois. That will be equivalent to 15.8 nut locks to the pound avoidupois. The nut locks that were used on this road were the National. By calculation I find for 200 miles of main line 26,734 pounds of nut-locks were used on the road. I have weighed a nut-lock and calculated what the weight should be. For all the nut-locks that were used, figured at the contract price for angle bars of $1.65 per pound

1222 would make that amount to $441.11, as against the charge made against us here of $9,558, I think. Angle bars they were to furnish at $1.65 per pound. Taking nut-locks at their actual weight as angle bars it amounts to that, $441.11. I can't tell you what there is patented about a nut-lock, or the points covered by the patent exactly, but the function of a nut-lock is to apply it between the bearing and the face of a nut or burr, and its function is to prevent that from becoming loosened by the trains passing over it. This one here is a spring. There are nut-locks which are not a spring. There are nut locks that consist of a piece of steel bent to an odd form. I do not say they are the same thing as
1223 a washer. The National and the Verona are very much alike. Instead of the thing having an abrupt impact it makes it springy, and the rattling of the nut does not make it loose as soon as if there were no nut-locks. It is to keep a constant pressure.

I have weighed the Verona nut lock. It weighs 450 grains. Fifteen and one-half to the pound avoidupois. The National nut-lock weighs 447 grains. I know that these were not charged to Mr. Clark by weight, because the vouchers came in the regular way, the same as the timber vouchers, and they were not charged by weight. And furthermore, by weight would not equal $9,958, which was charged. I know that $9,958 was the amount
1224 charged for them, because I had that account made up. The charge is on Mr. Clark's books. They are entered on Mr. Clark's books as charged to him by the Railroad Company.

Q (By the Referee.) Did Mr. Clark's bookkeeper give credit to the company on his books for these nut-locks? A. That was in abeyance. When the nut-locks were first shipped I called their attention to the fact that they were not covered by the contract. Mr. Kimball said to let this go on until the end of the work; and, under an agreement with him, they came right along, the same as any other material, and were treated the same as any other materal shipped by the

Purchasing Department of the Railroad. I won't say 1225
they were entered up on Mr. Clark's books. There was an account kept. They entered on the books the items for which they received vouchers from the Railroad Company, or from any other source.

HEMAN CLARK, recalled and further cross-examined by defendant's counsel, testified as follows:

I don't remember that any one else was present at the time I signed this receipt or acknowledgment of March 9, 1888, except the messenger who brought it to me. There was no one present representing the Railroad that I remember, or any one else that I remember. I don't think I did ever ask Mr. Bond 1226
for a copy of the receipt or paper, after I had signed it. His man stood right there and took it right back. I had signed other papers which were very similar. I never offered to return the check or the amount to Mr. Bond or the Railroad Company—the check for $173,000 which I received. I couldn't if I had wanted to. I used it. I could not have paid it back if I had desired to do so. I did not ask the messenger to wait until I had read the paper. He didn't make any objection to my reading it. He had no suggestions to make, as I remember. He made no suggestions.

Q. There was nothing to prevent your understanding it? A. There would be something to prevent me 1227
from understanding it from the fact that the business had been done out in the West, and I had not a clear knowledge of what had been done or what had been agreed to. The contents of the paper would disclose or would not disclose what I might presume to have been done out West.

Q. You said you did not get the meaning of it. What was there to prevent your getting the meaning of the words in the paper? A. Simply because I did not read it.

1228 WILLIAM C. EDWARDS, being duly sworn in behalf of defendant, testified as follows:

DIRECT-EXAMINATION by Defendant's Counsel:

I reside in Brooklyn. I am paying teller of the Guaranty Trust Co. in this City of New York. In the year 1888 I was cashier for Clausson & Dumont. I know Mr. Heman Clark. I knew him for the two years I was with the firm, 1887 and 1888. His relation to that firm was special partner. Their offices were at 40 Wall street. That was in the same building where the Chicago, Milwaukee and St. Paul Railway Company had its offices, at that time. I had business transactions with Mr. Clark for the
1229 firm. I had personal interviews with him about the business of the firm, and received directions from him as regards his own accounts. He had accounts with the firm.

The witness being shown the paper, which has been marked Defendant's Exhibit 36, was asked if that was his signature at the end of it, "William C. Edwards"?

A. Yes, sir; I signed that. I must have signed it as a witness. I couldn't have signed it in any other way. That is my signature. I couldn't say who brought it to me to be signed. I did not bring the paper to Mr. Clark to be signed, not to my knowl-
1230 edge. I had not any connection with the Chicago, Milwaukee and St. Paul Railway Company. I presume I must have signed my name to it in Mr. Clark's presence. I have no recollection about it. I know I did sign it. That is my signature.

Mr. Kellogg: We admit it.

I did not bring this check for $173,532.49 to Mr. Clark at the time the receipt was signed. Not to my recollection. I have seen the check before—not at the time or before it was canceled. I did not take this receipt to Mr. Bond - not to my recollection. I did not deliver the check to Mr. Clark—not

to my knowledge. I had been in the habit of seeing 1231
Mr. Clark at this time, every day. Our offices were adjoining.

No cross-examination.

FRANK S. BOND, recalled, in behalf of defendant, testified as follows:

DIRECT-EXAMINATION by Defendant's Counsel:

It is not the fact that this Defendant's Exhibit No. 36, signed by Mr. Clark, was sent up to his office with the check for $173,532.49. I never sent the check to him at or before the time the receipt or paper was signed. I am certainly positive about that. Absolutely certain. The receipt or paper re- 1232
ferred to come back to me signed by Mr. Clark and by Mr. Edwards before I prepared the check, and, of course, before the check was sent to Mr. Clark. Mr. Edwards did not take the receipt up to Mr. Clark. He was not connected with the Railroad Company in any way at all. Mr. Clark informed me a day or two prior to the 9th of March, 1888, that he had made a settlement with Mr. Miller in regard to the amount that was payable under his contract. I think it was the 7th of March. My letter book will show (witness refers to letter book). I state in my letter book that Mr. Clark had been in to see me that morning, in a letter to Mr. Miller, and had reported to me that he had made a settle- 1233
ment with him, and that a voucher would be forwarded to me to pay. Mr. Clark did not at any time, after the 9th of March, state to me in any way that this receipt or paper that he had signed at the time the check for $173,000 was paid to him was in any respect wrong, or that he would not be bound by it. He never said to me at any time that there was anything charged to him in the statement contained in that paper that was not right or properly chargeable. Mr. Clark never gave notice to the Railroad Company that he would not be bound in any way by the receipt.

1234 CROSS-EXAMINATION by Plaintiff's Counsel:

The account that was sent to me by the western office, and that I did not send to Mr. Clark, I have on my files. I kept it. It was apparently a duplicate. The other part of the duplicate was not sent to me. I kept the final receipt that was sent to me at the same time this statement of account was sent to me and which I retained. I never showed that to Mr. Clark, except as I sent it up to his office. I never had any talk with him about it. I had it in my possession at the same time I had this receipt—received by the same mail. I was not directed by Mr. Miller not to show this account. This matter
1235 of construction was entirely carried on by the officers of the company at the West. I had nothing to do with it myself other than as an executive officer. It was entirely managed there by Mr. Miller, the general manager. He gave all the orders and attended to all the business, unless directed by the Board of Directors otherwise. I did not assume any direction over the construction at all, or over the accounts. I had no dealings with Mr. Clark other than these two or three payments that came here, and I did not assume to have any.

I am refreshed now by the letter which I had written on March 7 of the fact that Mr. Clark was in and talked of a settlement. I mean to testify now, after being refreshed, that this interview to
1236 which I refer was with Mr. Clark personally. Mr. Clark stated to me at this conversation that he had made the settlement with Mr. Miller. He did not state where he had made the settlement with Mr. Miller. He did not state it was in a conversation held here in New York. I repeat in the letter the exact language. I don't want to change it at all. "Mr. Clark was in to-day, saying that you had settled with him and had promised to send his voucher, some $200,000 more or less, to be paid." That is what he said. I don't think there was any other subject talked of at this time that I saw Mr. Clark.

I have no recollection of any. I have not the slight- 1237
est recollection of anything else except that statement that is contained in that letter, in reference to what happened at that interview.

REDIRECT by Defendant's Counsel:

I cannot fix the date when these questions came up about these other matters that I have referred to that were brought before the Board of Directors—any claim of Mr. Clark. It was when Mr. Miller was on here, and he brought the matter to the attention of the Board. It was discussed and decided not to take any action except under the advice of counsel. It was, I think, in reply to Mr. Hegeman's letter to Mr. Miller in April, 1890. In these 1238
claims that were made nothing was ever said about the $40,000 deducted for not finishing the road within the specified time. There never was any objection made about that matter in my presence. I wrote to Mr. Miller on the 9th of March, at the time this receipt was signed. The letter that I wrote to Mr. Miller on the 9th of March refreshes my recollection as to what took place on the 9th of March between Mr. Clark and myself. It confirms my statement that I had made before with reference to the settlement, that I had paid this check to Mr. Clark and taken the receipt prepared by Mr. Cary for a final payment to Clark on the contract.

1239

FRANCIS W. KIMBALL, recalled on behalf of the defendant, testified as follows:

I was manager of construction of what was known as the Kansas City Extension of the line of the Chicago, Milwaukee and St. Paul Railway Company. This map or plan attached to the copy of the deed or agreement between the Hannibal and St. Jo. road and the Milwaukee and St. Paul in regard to the right of way at Minnaville shows the crossing that was made at Minnaville of the tracks of the C., M. and

St. P. road in accordance with the way it was finally arranged. The C., M. and St. P. road had a right of way there before that crossing was made. It was originally arranged that they should cross at some other point further up. By this arrangement there was an exchange of tracks. Our first proposition was to cross on this curve, but on account of the bluff which made it hard for them to see around and see a train which might be this side stopping, making that stop, and seeing this, the arrangement was ultimately made and we were to deed to them certain grounds we had acquired—we had acquired a right of way through here, and they were to give us part of theirs. There was no track down there at the time the arrangement was made with the Hannibal and St. Jo. from the north. They came down quite a little later. It didn't get down there before the arrangement was made. The arrangement was made before they got down there with the track laying from the north. There was no reason why they laid up at Dwyer Cut, except for the reason that they hadn't the work completed so that they could lay through there. The arrangement for making the crossing at Minnaville did not have anything to do with the laying up of the track laying or any other work at Dwyer Cut—not in the least. Those things have no connection whatever with each other —they laid up at Dwyer's Cut because the work was not completed, and they proceeded with the track laying as fast as it was; Mr. Russell made no arrangement with me about the delay at Dwyer Cut on account of the river bridge not being completed, or on any other account. It was not on account of the impossibility of getting the river bridge done soon enough to make it an object to do the necessary work, and to have kept on track laying that they did not lay the track. They did keep on track laying as fast as the work was completed. They had not got Dwyer Cut completed, and considerable work either side of it. The work was not held up there or laid up

there on account of the river bridge not being com- 1240
pleted—it was held up on account of the roadbed not being completed in that vicinity. There was not any connection between the non-completion of the river bridge and the stopping of work at Dwyer's Cut that I can conceive of. Just east of there, there was a deep fill—very heavy work for a mile or two on either side. The first work was done at Dwyer Cut previous to July 15, 1886. They began work on each side of it there. Then they continued in August, 1886; July, August, September, October, November, December, 1886, January, 1887, February, 1887. There was some talk of an arrangement to lay the track upon a bench of rock in the cut, so as to go through the cut and continue the track laying 1244
on down towards Minnaville. But no such arrangement was made. It was not done. The erection of the Missouri River bridge at Randolph Bluff was not any part of Mr. Clark's work. He had nothing whatever to do with it. If the road had been completed by Mr. Clark to the Missouri River Bridge by the first of June, 1887, it could have been operated to that point to advantage. There was quite a considerable local traffic. It was the object of the company to build that up, and a connection could have been made with the Hannibal and St. Jo. road at Minnavile. There was no physical difficulty in the way; that ran into Kansas City. After the main line was completed, considerable other work 1245
had not been done; sidings, cross covers and side tracks from one track to another. That was part of the contract, laying sidings and tracks around station houses. There was considerable work to be done after the track laying was completed at the end of October, 1887, there was various things lacking, something on the bridges, something at the water stations, and considerable in a small way with the side tracks. It was finally completed either by Mr. Clark or by arrangements made with him for the company's convenience, and charging it to him. If

1246 Mr. Hegeman testifies that there never was any final settlement or adjustment of accounts between the Milwaukee and St. Paul Railroad Company and him, representing Mr. Clark, or Mr. Clark, he is mistaken. I supposed there was a final settlement of everything. I don't know of any accounts that were not settled at the time. There was nothing presented that was not acted upon at the time, that I remember of. Nothing was brought to my attention that was not settled at that time. I do not know of any accounts relating to the construction of the road that were not settled then—only the complaint they made for timber that was brought to my notice last winter. That was
1247 about something afterwards. Everything about any timber that was taken by the company was settled at that time. I went over every account with Mr. Hegeman, or my bookkeeper, every account that there was any question about; as I remember it, Mr. Hegeman and myself took up and adjusted the only account that there was any question about when it left my office, my department, was the account of the nut locks. That was presented and passed upon by Mr. Whittemore and Mr. Cary. It went finally to Mr. Cary as I remember it. Every item that was entered into the engineer's final certificate was gone over at that time and adjusted. So far as I knew everything that entered into it. Everything that
1248 was deducted from the contract price as not having been done by Mr. Clark, and everything that was added for anything not included in the contract, which he did.

CROSS-EXAMINATION by Plaintiff's Counsel:

I think there was an arrangement made in February about the Minnaville crossing. I had something to do with the preliminary arrangement of it; that was completed, I think, by Mr. Meyers or by Mr. Miller, probably. I could not tell when the contract

was, in fact, made. I went to see the general manager and arranged the general terms of the crossing. Among other things the Hannibal and St. Jo. were to put down the tracks for their road on the land that had been brought by the Chicago, Milwaukee and St. Paul, by this change. I remember that we exchanged tracks there. They took part of the right of way the St. Paul road had purchased, and we put our tracks—were to put our tracks upon the land that had been theretofore occupied by them, upon the roadbed. I remember that there was an exchange of tracks, but I could not say now whether Mr. Clark or the Chicago, Milwaukee people laid down the new tracks for the Hannibal and St. Jo. I could not tell you the date when in fact that exchange of tracks was made, practically at the time the gap was closed and the track laying finished by Mr. Clark in November, I think, 1887. I mean by "the gap was closed" they had laid from Minnaville down to the bridge and the track was unlaid from the north to Minnaville. It had reached a certain point north of the crossing, and had been laid from the bridge up south to the crossing.

REDIRECT EXAMINATION by Plaintiff's Counsel:

I furnished the figures, the accounts and the amounts that were due to Mr. Clark, or to be charged to him, or with which he was to be credited for materials furnished by him for the construction of the road; for the Chief Engineer's final certificate. That came within my department, and included the nut locks. If I remember, the amount caused by the change of line at Randolph Bluff from Harlem Station was made up by Mr. Whittemore, the Chief Engineer. I made up estimates of amounts to be deducted for not building a certain number of stations, and for all extra work and all material of any kind furnished. And those accounts were all gone over between Mr. Hegeman and me.

1252 FREDERICK A. DELANO, a witness on behalf of the defendant, testified as follows:

I reside at Chicago. I am superintendent at Chicago over terminals of the C., B. and Q. Railway. I have been in that position a little over six years in Chicago. I began work for the C., B. and Q. in 1885, and in May, 1887, I was put in charge of investigating the life of rails and of track on the C., B. and Q. and proprietary lines, and I was on that work for three years. That work involved studying the manufacture of the rails at the mill, the inspection of the rails and inspection of track, and that I did by walking over track; and the manner and method of track laying; that was from May, 1887, until April,
1253 1890. I know what was the practice at that time and immediately prior to that time on the C., B. and Q. and on railroads in general in the use of nut locks on rails in connection with the laying of rails. I know that generally nut locks were used in the construction of a road: practically, universally nut locks were used except where a bolt was specially designed to do away the use of the nut lock; they are called bolts with lock threads, the shape of the thread is different, the angles of the teeth in the thread are different from the ordinary bolt, and the idea is that it prevents the nut from unscrewing; although the nut can be screwed on it cannot be screwed off. There is one bolt on the market called
1254 the Harvey grip thread bolt. That is one of the principal ones. That is a nut lock that locks itself. They were very rarely used, I will say, at that time. They have come into use since, and there are some devices that have come into use since, that avoid the use of nut locks, such as a nut that is itself a spring lock, has a spring nut. It is cut through so that it acts like a spring on a grip or chain; it acts on the bolt in such a way that it jams on there and cannot be unscrewed; before that nut locks were practically universal. I consider them necessary to

be used in the construction of a road in the most 1255
substantial and workmanlike manner that nut locks should be put on. I should say that a road without them would not be complete in every respect, so far as the workmanship of construction was concerned. It would not be constructed in the most substantial manner.

CROSS-EXAMINATION by Plaintiff's Counsel:

I have kept myself posted in reference to the use of nut locks on all railroads. There are two kinds of nut locks in general use; that is, two classes, one kind is simply designed to prevent the nut from backing off, and another kind, which is designed to 1256
prevent that, and also to take up a certain amount of rail and slack between the nut and the angle bar; the first kind is called a positive nut lock, and the second is called a spring nut lock, or spring washer; at the present time there are something like twenty or twenty-five patented nut locks. The Verona nut lock is a very common nut lock. That is a spring nut lock; so is the National. I think that some device to prevent the nut from coming off the track bolt is absolutely needed in order to have the road complete--there are a great many such devices. They are called nut locks. I think that no road would be complete, or finished, rather, in a substantial and workmanlike manner, without the use of 1257
nut locks or lock nuts. I think it is perfectly possible to make a nut that will stay on without the use of a nut lock. I know a number of roads are experimenting with other devices, with a view of abandoning their use altogether, but I am not aware that any of the roads have discarded the use of lock nuts or nut locks; there is a substitute for a nut lock, and where a substitute is used the nut lock does not have to be used.

1258 REDIRECT-EXAMINATION by Plaintiff's Counsel:

In my track inspection in Chicago and over the different lines of road which I have been over I did not find anywhere that nut locks were not used; they are always used in connection with a splice bar; and it is my opinion that in all cases either a nut lock or some device equivalent to a nut lock is necessary to be used to protect the road, protect the bolt, or prevent the nut from slipping off the bolt. I have always found them so used.

RECROSS-EXAMINATION by Plaintiff's Counsel:

I mean to say that a good nut lock will prevent
1259 the nut from slipping off the bolt, or turning or loosening, if the nut is tightened up so as to engage the nut lock. If it is not sufficiently tight to do that, of course the nut lock does not act, cannot act. Any good nut lock with a nut put on properly will lock the nut. The Excelsior will do it; the National will do it; the Standard will do it. If put on properly. I want to say one other thing, that there is a difference between nut locks even of those kinds that I have mentioned. For instance, there are a great many different kinds of Verona nut locks, according to the cross section of the part they are made of. For instance, you can use a nut lock that has not spring enough for the bolt which is used. I
1260 mean that a proper nut lock properly put on will prevent the nut from coming off the bolt. I know that the Verona is a patented article. The National also. I say I know – I presume they are all patented; I think I can say I know about the Verona. I should say that the Harvey grip thread bolt without the nut lock was cheaper than the ordinary track bolt with the nut lock. This Harvey thread bolt has been in use I should say five or six years that I have known of its being in permanent use. I don't know when it was first designed. The first I knew of it was five or six years ago. In my opinion a road

built where the splices were made with Harvey 1262
thread bolts and no nut locks, I should say it was complete, but could not call it the best standard. I would say the road was finished in a workmanlike manner, with a Harvey grip thread bolt.

RECROSS-EXAMINATION by Mr. Rose:

In my opinion a nut lock is not a part of the splice, but a part of the joint.

REDIRECT-EXAMINATION by Defendant's Counsel:

I should say that the joint was not complete unless there was some device to prevent the nuts from 1263
coming off the trackbolts; the splice is part of the joint. It consists of the two angle bars, one on the inside and outside, and another part of the joint is the bolts and the nuts, and causes the two ends of the rail to come together to make up the joint. It is the joint between the two ends of the rail that forms the connection between the two rails. The spikes and the ties under them are also necessary to complete the joint. Of course the splice bars have to be spiked down to the ties, and they all together make the joint.

RECROSS-EXAMINATION:

I mean that the splice bars or angle bars have 1263
to be spliced by being spiked to the tie. I suppose the best practice would dictate that. A nut lock is a part of the splice of an angle bar joint, of a joint in which angle bars are used, or some kind of a locking device; nut locks are not, if some other device to accomplish the same purpose is used; a nut lock or its equivalent is a necessary article to make a perfect and completed splice at the end of two rails, to join two rails together. Certainly, it is not the only thing which can be used.

1264 D. J. WHITTEMORE, being recalled on behalf of the defendant, testified as follows:

Q. Mr. Whittemore, Mr. Hegeman testifies that at the time he went over the accounts with you he made a claim for nut locks, and that nothing else was presented to you except the formal accounts, and then he says that you did not make any rulings at that time, that the only thing you were asked about was nut locks, and that you threw that off and never made a ruling. Is that so? Did you or not make any rulings? A. My recollection about that matter is this, that I did rule that it was a part of the Clark contract, and at the same time I think
1265 I told Mr. Hegeman that I would refer the matter to our legal department and get an opinion from it. That was done. I did at that time give my decision that it was not an extra, but was required to be furnished under the contract, and I declined to certify it in my final certificate.

Q. Mr. Hegeman says the only thing you took up for adjustment at that time was the formal running accounts between Mr. Clark and the Railroad Company. Is that so? A. I don't know what he means by that. I know for several days he and his clerk were in adjusting accounts with the Superintendent of Construction, Mr. Kimball, and after those accounts had been adjusted, I called Mr. Hegeman in and went over with him and showed him, account
1266 by account, all matter which came in my department, some extra work, and went through with it all, and the adjustment of the change from Harlem Station to Randolph Bluff. That was not a formal account. There was no account of that on the books. An approximation of that had been made as a deduction in former monthly estimates. There were not any other accounts of any kind, whether formal or informal, than those that are provided for and passed upon by my final certificate, considered at that time—nothing except the nut lock question. There was no other account that I know of or had

any knowledge of, relating to the construction of 1267
the road in any manner or form whatever, or for any extra work that was not in the papers that we had before us, and there was nothing else on those books that were shown to me at that time relating to the construction of the road. I thoroughly insist that it was a final accounting in relation to the construction of the road, preparatory for the final estimate, and in relation to everything that was due to Mr. Clark under the contract for work done under the contract and for extra work. I asked him after I had gone through with these papers, I turned to him and asked him if he had anything more to present, anything to present. He said he had nothing more. 1268
It was with a view of making up a final estimate of the amount due to Mr. Clark. I have no recollection of saying that the nut locks were used on only something like twenty-five per cent. of the mileage of the Milwaukee and St. Paul road at that time in 1886, and I can hardly conceive that I could say it, for it would not be true. It was not the fact. There was about fifty-five per cent. of our entire mileage that had nut locks.

CROSS-EXAMINATION by Plaintiff's Counsel.

In the Chicago, Milwaukee and St. Paul road, in 1888, there were about 5,400 or 5,500 miles of road. 1269
At that time it would be more than 55 per cent. that had nut locks, because there was 55 per cent. nut locked in 1886. I cannot think of anything else except the nut locks that was in dispute between Mr. Hegeman and myself at the time of the so-called final account. That was the only item that was in dispute, about which there was any dispute in making up the account. It was not agreed to be referred to the legal department. I made my own ruling, but I said I will submit the question, however, to our legal department. I did do so. The amount was not determined at this time that should

1270 be reserved to meet the King and Wetherill claim. I had nothing to do with the question as to whether Mr. Clark or the Railroad Company should pay the $1,999 for the death of a brakeman, a judgment for the death of a brakeman. That was not taken into consideration at all.

FRANCIS W. KIMBALL recalled:

FURTHER CROSS-EXAMINATION by Defendant's Counsel:

Just below Polo, or rather between Polo and Lawson, there was a bridge called Chicken Bristle Bridge; I remember that after that bridge was
1271 partly put up, the plans were found to be incorrect and the bridge had to be torn down and rebuilt. The track was not laid up there on that account. My impression is that there might have been a delay of three or four weeks after the building of this bridge.

REDIRECT-EXAMINATION by Defendant's Counsel:

The bridge at Randolph Bluff was completed before the tracks were connected at Minnaville, somewheres about three weeks, I think. None of this construction, west of the river, and the connection with Kansas City affected in any way the comple-
1272 tion of the line to the Randolph Bluff Bridge. It didn't delay that work in any way at all. There was not any delay on the part of the Railroad Company in finishing the surfacing which it took off at Mr. Clark's hands, under the supplemental agreement, other than the necessary time to do the work. It was prosecuted vigorously, I think—commenced right after that track was laid. Followed right up and was completed as soon as it could have been. This road could not be operated successfully until it was completed down to Randolph Bluff. It could not be operated to the best advantage in small sections.

RECROSS-EXAMINATION: 1273

If the road had been completed down to Randolph Bridge, the whole 200 miles, that part could have been operated. I say that the bridge over the river was completed as to rails, ties and everything, three weeks before the connection at Minnaville. A train was run over it on October 11th. It was completed on October 10th, and a train was run over it on October 11th across the bridge to the north end, connected from the other way. It was full tied. I think everythng was complete.

The last piece of track that was laid by Mr. Clark in order to complete his track laying was the Minnaville crossing. I think Mr. Clark had his track laid from the end of his contract, near the bridge, up to 1274
or near the Minnaville crossing. I think there was some track to be laid between the end of the Clark contract and the bridge, when the bridge was completed. That is my impression, but it was not connected there. After this last rail was laid, and the connection made there at Minnaville crossing, there was this other work to be done that I specified before. Various things—it was so that trains could be run, but there were various things to be done to complete the contract. Through trains did not begin to run for some time after that.

LEWIS T. MOORE, a witness called on behalf of the defendant, testified as follows: 1275

I reside in Chicago. I am employed as a consulting engineer by the Illinois Central Railroad Company at present. I have been so employed since March, 1892. Before that I was chief engineer of the Illinois Central road from August, 1887, to March, 1892. I have been at work for the company since 1867, and have been familiar with the roads, especially from Cairo to Dubuque especially, up to 1880, when I came to Chicago and looked after the whole line. In 1877, we commenced using angle bars, for the first time on the road in place

1276 of fish boards; they had no angle at the bottom. What they call fish plates. They were two flat parts, each fitted into the thin part of the rail on each side; those were used in 1870 and along that time without any nut locks whatever. After 1877 we used angle bars. We always used nut locks with the angle bars. What we used first was the Pratt washer, composed of malleable iron and rubber. Those failed from the hardening of the rubber, and from that time we adopted the use of the Verona nut lock in 1877, and have continued it to this time, and are using it now on all the rails we lay, on all the lines of the Illinois Central Railroad. I consider that an effective and good nut lock for
1277 the purpose for which it is intended. It is the best we know of, efficient. I would say as to the construction of a railroad without the use of nut locks on the joints that it would not be workmanlike construction or construction in a substantial manner. Nobody lays rail that way. The extent of the lines of the Illinois Central Railroad is now 3,127 miles. That includes the line to New Orleans and its branches. Nut locks are used over the entire line. I would not consider the placing of an angle bar or a rail spliced for making a joint, without a nut lock, a proper construction—not at all.

CROSS-EXAMINATION by Plaintiff's Counsel:

1278 The kind of nut lock that we are using is the Verona nut lock, so called, and is of steel, a flat steel rim we call it, cut in and twisted slightly at the cut, at the opening, tempered steel; it is the commencement of a spiral spring. Such a nut lock is a part of the splice of the joint of a rail. In practice it is. In laying our tracks we always lay the main track with it. It is a part of the joint; it is not a part of the splice nor a part of the bolt. It is necessary to be used in connection with the splice to perfect the joint; the joint splice consists of the splice, the bolt and the nut lock. The bolts and

nuts, I consider them as one thing, bolt and nut. 1279
The whole thing would not be complete or could not be used effectively without the nut lock. Spikes are also a part of the track laying material; they are not a part of the joint. Spikes are part of the track material, the same as the ties and rails. The track consists of the ties, the rails, the angle bars, the fish plates, and the bolts and nuts, and the nut lock.

ROSWELL MILLER, recalled on behalf of the defendant, testified as follows:

Q. Mr. Miller, Mr. Clark has testified in this matter that in answer to your telegram of February 1280
23d, 1888, making inquiry whether Mr. Hegeman was fully authorized by Mr. Clark to make final settlement on his contract for construction of the Kansas City line, he replied that Mr. Hegeman was not authorized. Then later he said that his reply was that Mr. Hegeman was not authorized to settle and finally adjust accounts for him. Which was it, that Mr. Hegemen was not authorized to make final settlement on his contract for the construction of the line or was not authorized to settle and finally adjust accounts for him? A. My recollection is that my telegram to Mr. Clark was the question whether Mr. Hegeman was authorized to make final settlement of the account, and his reply was that he was 1281
not authorized to make final settlement. I don't remember that we sent any statement of account to Mr. Clark at New York. We sent a voucher for a final settlement, but it stated the general terms of the matter. It was the voucher which contained in a general way the main points of the settlement.

I cannot state in dollars what loss it was to the road—to the company, not to have had the road, this part that Mr. Clark was to build under his contract, completed by the first of June, 1887. The elements of loss were, first, the loss of the fall traffic; second, getting into the winter with a new

1282 road. If the road had been completed by the first of August, it would have been time to have surfaced it and got it in proper shape to go through the winter without substantial impairment. Being completed so late—being impossible to do this, we had to take the road as it was. That is, the road was not in condition to be satisfactorily operated during that winter. If we had had it completed by the first of June or the first of August, 1887, we could have got the road into condition to be operated satisfactorily that winter. I remember seeing Mr. Hegeman at Milwaukee some time in that month of January, and telling him that I declined to make any further payment until there was a final settlement.
1283 I cannot remember that Mr. Hegeman at any time prior to the ninth of March, 1888, at the time Mr. Clark signed this receipt, for the final payment, made any statement or claim to me that there was any claim by him, or on the part of Mr. Clark, for any extra work done under the contract, or any extra compensation due to him under the contract, other than was allowed in the Chief Engineer's final estimate, except, possibly, the nut-locks. Possibly he made that claim prior to that time. It is not the fact that six or eight days prior to his signing this receipt, or acknowledgment of satisfaction, March 9, 1888, Mr. Clark had an interview with me at his office in New York. I was not in New York at that
1284 time. I did not have any such interview with him prior to the receipt of the telegram of February 23, 1888. My recollection is that I was not in New York between the first of November, 1887, and the first of April, 1888. I have tested my recollection in regard to that by reference to my letter books, letter and telegram books. I did not have any conversation with Mr. Clark in New York or elsewhere prior to March or February, 1888, in regard to the account or payments to him, in which I stated that I was going back West, and that I would have all the accounts made up; that they were in process of adjusting, and had been for some time, and that

when I got there I would have them made up and 1285
send him either a final payment or a good large
check on account. I never had such a conversation
with him. I did not tell Mr. Clark that I would
come on to New York for the purpose of adjusting
the accounts with him, or that I would sit down
with him and go over the various matters that had
accumulated during the construction of the road,
and adjust things in a satisfactory, business way.
I don't remember any conversation with Mr.
Clark at any time prior to March or Feb-
ruary, 1888, about nut-locks furnished by him
in the construction of the road; nor was
there any conversation with him in regard to nut
locks in which I stated that he had a good claim for 1286
nut locks. I never conceded that he had a good
claim for nut locks. I never said to Mr. Clark at
any time or place that nut locks were an extra
matter and should be paid for, or that they were
clearly extra in my mind. I did not say to Mr.
Clark at any time prior to the signing of the receipt
of March 9, 1888, that if there was anything wrong
in the receipt I would right it on some future ad-
justment. I had no such interview with him. I
did not say that to him at any time after the receipt
or acknowledgment was signed. Mr. Clark never
stated to me at any time that there was anything
wrong in the receipt or acknowledgment. I have
already stated that I was not in New York at the 1287
time this paper was signed by Mr. Clark; this
acknowledgment of satisfaction. I did not see him
about it at all. It was sent on to Mr. Bond. That
is shown by the letter here from me in which it was
enclosed. I did not tell Mr. Clark after the receipt
was signed, that these matters or any matters per-
taining to the paper, or the items of it would be
taken up by the Railroad Company. I did not say
to him that I would refer the whole matter to our
board or executive committee and have it all con-
sidered. I did not afterwards tell Mr. Clark that
the matter had been brought up to the board, and

1288 through the advice of their counsel, or committee of officers that it came before, that the receipt was strong enough to bar him from any and all claims. Mr. Clark did not say to me, "That is an injustice." I did not say to him, "I know it is; you have got claims there that are equitable I think, and I would like to see them adjusted," or anything to that effect; nothing of the kind. Mr. Clark never gave notice to the Railway Company, through me, either as General Manager or President, or in any other way that I know of, or ever heard of, that he objected to anything in this paper of March, 1888, unless you can consider the claim for nut locks that was made afterwards, an objection; nor that he had any
1289 objection to any item charged in it against him. He never gave me or to the Railroad Company in any way that I know of, any notice that he objected to the item of charge stated in the receipt of $40,000, as a forfeiture for not completing the road by the first of June, 1887, or at the time specified in the contract. He never stated to me that there was not an agreement that that amount should be deducted from the contract price if the road was not completed by the first of June, 1887, or that the statement contained in the receipt in that respect was not true. He never made any objection that he was not chargeable with that amount on that account, or that he was not chargeable with the for-
1290 feiture for not completing the road by the first of June, 1887. Mr. Clark never informed me or the Railroad Company in any way in writing or otherwise, that he did not intend to be bound by this receipt or paper of March, 1888, or that he did not intend to be bound by any charge in it against him. He never stated to me at any time that he had found out that the right of way had not been procured until after the limitation of the contract, nor did he ask me if I would hold him to anything like that. That is, the penalty of forfeiture for not finishing by June 1, 1887. I did not say to him, I don't know about that, I understand there was

something about a $40,000 forfeit, it is in the con- 129
tract. He never questioned me in any way that he had sent the telegram which Mr. Kimball and I testified that he had sent in reply to my telegram and letter in March, 1886, about the forfeiture of $40,000, or deduction of $40,000 from the contract price, if the work was not finished by the first of June, 1887. I was not in Mr. Clark's office in January or February, 1888, to see him or Mr. Dumont. I did not have any conversation or interview with either of them in regard to Mr. Clark's contract or his accounts with the Company. I was not there during that time. I never had any interview with him in his office in New York at all. I never had any intimation in any way from Mr. Clark about 129
any objection to the receipt or acknowledgment of satisfaction of March, 1888, or about any items contained in it or charges made against him, prior to the beginning of this suit. I remember the time when Mr. Hegeman came to Milwaukee in 1890 when the matter of nut locks was talked about. I remember his bringing up the matter of nut locks when he came there; I don't remember the date. That was the only occasion in which anything was said about any claims, the only claim that was made. The matter of the nut lock claim was brought before the Board of Directors, nothing else: The construction of the Missouri bridge had nothing to do with Mr. Clark's contract or the finishing of 1293
this work. The road could have been operated to the Missouri River for local traffic if it had been completed to that point in June or August, 1887, even if the bridge was not completed.

I informed Mr. Clark or advised him, before or at the time that this receipt or acknowledgment of satisfaction, or payment, was sent on to New York, that it would be sent. I sent him this telegram, dated March 7, 1888, reading: "Heman Clark, New York, voucher mailed to Mr. Bond to-day. Roswell Miller." That I sent. That was the same date on which the paper was mailed; the voucher was

1294 mailed to Mr. Bond by the letter which has been produced here before.

CROSS-EXAMINATION by Plaintiff's Counsel:

I recognize Plaintiff's Exhibit 28 as being the telegram that I referred to in the early part of my testimony as having been sent to Mr. Clark by me. There was an answer received to that. I have not been able to find it. My best recollection is that the wording of the answer was: Mr. Hegeman is not authorized to make final settlement of contract, and he may have added that he would make final settlement in New
1295 York, but I do not recollect it. My recollection is not positive as to that point. My recollection is that his answer was in the negative. I was at that time general manager of this road. Mr. Alexander Mitchell was the president. My recollection is that Mr. Clark's office in New York in 1887 and 1888, was in the same building we were in, 40 and 42 Wall street. I know Mr. J. B. Dumont. I understand he and Mr. Clark occupied rooms together. I was once in Mr. Dumont's office. I think it was the summer of 1888, after I went to New York. I did not go to New York until April or after, and I think it was that first visit. I saw Mr. Dumont then in his office. Mr. Clark was not there. I do
1296 not remember seeing him then. To the best of my knowledge I did not ever see him in Mr. Dumont's office, nor did I ever see Mr. Clark in his own office. I may have had an interview with Mr. Clark in the Railroad Company's office. I don't remember when. I am sure I had one; I presume I had more. I don't remember or recall the subject of the conversation. It was undoubtedly with reference to this road. But I cannot recall when that was. I remember that this claim for nut-locks was presented to the Board in New York. The only paper I sent to Mr. Clark was a voucher. The voucher had attached to it, or as part of it, I don't remember which, what you

might perhaps call a statement of account; not an 1287
independent statement of account, but part of the voucher. That was sent to Mr. Bond. I sent nothing at all to Mr. Clark directly. To my recollection nothing was enclosed in that except the statement which was a part of the voucher, except the voucher itself, the receipt, and what appeared on the papers that preceded the receipt. All fastened together, the same as they now appear. I don't know of anything else. There was not any statement of account sent to Mr. Bond prior to March 7, 1888, not to my knowledge, nor after that, not to my knowledge, nor by my direction. I was not present at the time the contract was signed by Mr. Clark; I was West. I was at the Gilsey House 1288
at the time Mr. Clark was informed that his bid was accepted. That was two or three weeks before the contract was signed, perhaps more than that. I cannot recall that I had any correspondence with Mr. Clark asking for money, except as specified. Mr. Hegeman undoubtedly told me from time to time that he wanted money. I told Mr. Hegeman that no payments would be made until final settlement was made. My present recollection is that it began by Mr. Hegeman desiring an advance on the contract. They were not through then. I don't know what had not been done. I declined to pay any more until final settlement. But the details of the conversation, what was said 1289
by me or him, or the substance of it, I cannot give. I mean by refreshing my recollection from my letter and telegram books, that I find from those books that from the first of October until some time in April I was daily transacting business through those letter books, in the West, and was not in New York. I never had a conversation with Mr. Clark in regard to nut locks prior to the beginning of this suit. I am positive of that. I don't know whether I went over the road on the first trip or not. I went over it early; whether it was the first trip I don't remember. I presume it was not.

1300 REDIRECT-EXAMINATION by Defendant's Counsel:

I remember the conversation that has been testified to on former examinations about my interview with Mr. Clark and Mr. Hegeman at the Gilsey House at the time of the letting of the contract to him, or the giving of the contract to him was determined upon. I remember that at that time there was a conversation about a deduction of $40,000 as the amount of damages that would be incurred by the railroad company for not building it by the time specified, the first of June. That was the fact. I don't remember that it was stated then that that was based upon what would be the amount
1301 of damages, or that Mr. Clark asked me what would be the amount of damages sustained by not completing it at that time, and I stated that I estimated it at about $40,000. I don't remember that it was fixed at $40,000 because that was estimated to be the amount of damage to us. I remember it was fixed at $40,000; it was agreed upon. I don't remember what the basis was. I am quite sure that these conversations that I had with Mr. Clark at the company's office were not in the year 1888 prior to the signing of this paper, prior to March.

J. B. MOLL, a witness called on behalf of the defendant, testified as follows:

1302 I reside in Chicago. I am a general roadmaster of the Chicago, Milwaukee and St. Paul Railroad. I have been so for eight years. Before that I was division superintendent for two years previous to that of the Iowa and Dakota Division. I have been connected with the railroad business for thirty-five years, and have had knowledge of the construction of railroads. My special duties as roadmaster are to see to the condition and maintenance of track chiefly. I know about the use of nut locks in the construction of a road and its operation. To the best of my knowledge, we have had them in general use since early in the "Eighties," say about

1881 or 1882. They are very largely used on rail-
roads generally. A road could not be constructed
in a substantial and workmanlike manner without
the use of nut locks, not with the ordinary track
bolts that are ordinarily used. I should say that the
track was not complete without nut locks. That or
something equivalent to take its place, a lock or nut
to prevent it from turning. I don't think there is any
substitute for them. I know the Verona nut lock that
is largely in use on the Milwaukee road and on other
roads. I have found it to be efficient for the pur-
pose for which it is intended. Nut locks are used
on all joints and splices; they are on our road on all
joints and splices—on the Chicago, Milwaukee and
St. Paul Road, and generally speaking, on the other
roads that I know of.

CROSS-EXAMINATION by Plaintiff's Counsel:

A nut lock belongs to the joint. In classifying
it, it would come in as track material, the same way
as the angle bars or the bolts. I would like to ex-
plain a little: For instance, if we receive a certain
amount of rail, I always order the fastenings, and
in ordering the fastenings we mean angle bars or
splices, bolts and nut locks, and now we go further
and use washers also in addition. We call that
track material, a joint fastening; it is not complete
without it. It is part of the joint. Washers are not
absolutely necessary to be used in building a com-
pleted road. I don't mean to say that I could not
build a road and run trains over it without the use of
nut locks.

REDIRECT-EXAMINATION by Defendant's Counsel:

The effect of operating a road without nut locks
with the ordinary bolt such as we have been in the
habit of using, the effect would be that it would be
a very hard matter to keep the angle bar in close

1306 contact with the rail where it belongs; of course the bolt holds the angle bar. The road could be operated without it in an efficient and effectual way for any length of time. The ends of the rails would become loose and the angle bars would become loose; it would increase the cost of maintenance. You would have to screw up the bolts often and the nuts often. It would increase the wear and tear of the road. While a road might be operated for a time without a nut lock, it would not be constructed in the most substantial and workmanlike manner if they were left off. I should not think it would be finished right without them.

1307 RECROSS-EXAMINATION by Plaintiff's Counsel:

The effect of leaving off nut locks would be to require more care about screwing up the nuts on the bolts, and might after a time shorten the life of the rail and undoubtedly the bolt also. Roads were run, or were constructed, and business done on them for many years, without the use of the nut lock. Not very many years, in my experience, without the nut lock. Nut locks have been used, to the best of my recollection, about somewhere from 1880 to 1882. I have been in the railroad business for thirty-five years. Prior to that time, then, they were using nut locks.

1308

By Mr. Bangs:

There would be one other effect of operating a road without a nut lock---that the track would be rougher; that the ends would not fit so closely together. The track, the smoothness, depends entirely on the two ends being solid, so that one end will not be above the other, or move at the joint, so that the ends will come close together and keep there. If the track is not in good condition, it is always injurious to the

rolling stock. The information I have is that there are over two hundred million nut locks in use. It would cover over 100,000 miles of railroad.

RECROSS-EXAMINATION by Mr. Rose:

I only know from information the Verona people give. I would not swear that there was any such quantity in use at all.

D. J. WHITTEMORE, recalled on behalf of the defendant, testified as follows:

The Randolph Bluff Bridge was finished before the track laying was completed at Minnaville or the other part of the road. The road was finally accepted by me as Chief Engineer of the Milwaukee road, the morning that I made out and dated the final estimate. That date has gone from me, but I have an impression it was the third of March, 1888. I never finally accepted the road as complete until that time. I compiled the estimate nearly two weeks, I think, before that, but there was some other work to be done, some adjustments on the line, and I held it from file until the morning on which it was dated before rendering it. I declined to accept it until that work was completed. I can identify those papers produced as my monthly estimates, for each month from May, 1886, to January, 1888. Those are my estimates. Those include all my estimates except the final estimate between those dates, May, 1886, and January, 1888.

CROSS EXAMINATION by Mr. Rose:

I understand that there is one for each month from May, 1886, to January, 1888; I believe there is. I know when the Randolph bridge was completed from the report of my assistant in charge of its construction. I was there a few days after; I can't say

how many; a very few days. I was not there at the time the road opened, not the day it opened. I went with a special train that went around through Kansas City, I believe. That went over the whole line of the road; I think so, from Ottumwa down. I cannot just tell whether that was an opening train or not; I think not; I think it was a directors' train. I did not in making up these various estimates receive any instructions from the directors of the company as to how to make them up, what I was to put in them; nor in making up the final estimate did I receive any instructions. I presume I did have conversations with Mr. Miller with reference to making up these estimates, or some of them, but I cannot recall it. Not as to what I should include in them. In making up the final estimate, I did not act on any instructions I received from Mr. Miller. I acted upon the instructions contained in the contract, I suppose. On my own determination and the same with all the monthly estimates. Without instructions from anybody as to what they should include. I had no instructions from anybody. Reports were made to me by the various field engineers, and from their reports I made up these estimates. I am confident I had no instructions what to allow or disallow from any of the company. There were not any instructions given to me by some of the company to make those estimates as small as possible during some of the months. I am positive of that. There were not any instructions given me in making up any of the estimates, monthly or final, to make them as large as possible, or to be either stingy with Mr. Clark or be liberal with him, nothing of that kind. Mr. Miller never had any talk with me, or anybody else on that subject.

REDIRECT-EXAMINATION:

I had sole charge of making up the estimates. There was nobody superior to me in regard to that,

as chief engineer. I could not admit anybody. If 1315
anything of that kind had been insisted upon I should have left the services of the company. I acted entirely upon my own judgment, from the information and reports that there were made to me by the other engineers for the amount of work that had been done.

RECROSS-EXAMINATION by Mr. Rose:

I can't remember any conversation in which Mr. Miller told me to treat this matter in a practical way and be liberal with Clark. I have no recollection of his telling me anything of the kind.

1316

JAMES M. MCKINLAY, a witness on behalf of defendant, testified as follows:

I have been Assistant Secretary since the year 1868 of the Chicago, Milwaukee and St. Paul Railway Company. I remember the time that this contract between Mr. Clark and the Chicago, Milwaukee and St. Paul Railway Company was executed by Mr. Clark. It was here in the City of New York at the office of the Company, then at 42 Wall street. I think it was in 1886, in March. I cannot say the exact date; but I know it was on or after the 13th of March. Mr. Wadsworth was not present at that time. He was not in the city. He had not been in 1317
the city for five or six months before that. I think it was at least five weeks. Mr. Wadsworth was an invalid at that time. I remember the fact of his having gone away from the city. He had been an invalid for some time before his death. He stayed away a great deal. Perhaps he may have been around the office about half the time before he went away. In the original copies of this contract which have been produced here these words are written at the end: "In Article 15, near the beginning, and at

1318 the end, the amount $3,914,600 was changed so as to read $3,954,600 " (and the figures are inserted as well as the words) " before delivery of this contract." That is my handwriting on both of these copies shown to me. On the copy that is signed by Roswell Miller, General Manager, under this notation is signed J. B. Dumont and my name. I signed that. I made that change by direction of J. B. Dumont, who was then Second Vice-President; he showed me papers which authorized the change to be made, and asked me to draw up the wording that would suit, which I did, and then it was written in. This was after Mr. Miller's signature had been attached. It was before Heman Clark's
1319 signature was attached. I do not remember that I was present when Mr. Clark attached his signature. I know that this little memorandum, signed by me and Dumont, was written before Mr. Clark's signature was here. Mr. Clark was in our office at the time that the notation was made. I don't say that he was looking over my hand while I was writing it, but he was in the office at the time. He knew what was going on. I couldn't tell whether these two signatures, Weston and Ferry, were attached then or afterwards. I was in the office, in the room probably, when Mr. Clark signed this contract. I don't remember whether it was in my presence or not. I made the alterations in the contract in Arti-
1320 cle 15, Section 1. That word "fifty" is in my handwriting. The change of that figure to a "5" is in my handwriting; but those pencil figures are not in my handwriting. On Defendant's Exhibit No. 77, Section 1 of Article 15, I inserted the word "fifty" between the words "nine hundred" and "fourteen thousand," and I changed the "fourteen" to "four." It had been changed in pencil, and I wrote over the pencil, in my handwriting, with ink "fifty," and I drew these lines across the "teen," and I changed that figure to a "5"; so

as to make it read, instead of $3,914,600, $3,954,600 in figures. The same in Section 1 of Article 15 on Plaintiff's Exhibit No. 1; on that it had not been panciled beforehand.

Both copies of these contracts came to the company signed by Mr. Miller, as General Manager, before they were signed by Mr. Clark; I have kept the minutes in the New York office ever since I have been in the office of the meetings of the Directors and of the Executive Committee. Those meetings were held here in New York. I have the record here that was in existence at that time. I know that there was some kind of a claim presented by Mr. Clark against the R. R. Co. I think it was in the year 1888.

CROSS-EXAMINATION by Plaintiff's Counsel:

I have not got that notice of claim here with me that was presented in 1888. I only knew it by a minute made in the board meeting. I only know where Mr. Wadsworth was in March, 1886, by hearsay. I will swear positively that I did not see him in March, 1886. I was in the City of New York all the time in March, 1886. I will swear that Mr. Wadsworth was not in the City of New York in March. He returned to New York, I suppose, in April—but I am not sure; after the 17th. I saw him after he came back, but, of course, I don't remember the exact time when he came back. I will swear that I did not see him on the 1st of April. I know and remember that Mr. Wadsworth said he was going South—going California way, as I understand—for his health, and I know he was absent from the city from the letters and telegrams about that time, and I remember it without referring to the book.

1324 Defendant's Counsel:

This book now shown to me is one of the volumes of our minutes. That book is exclusively in my custody. By the entry there of a meeting held the 17th of April, 1890, I see that was the time that the claim of Mr. Clark was considered. It was 1890 instead of 1888. If I said 1888 it was a mistake.

RECROSS-EXAMINATION by Plaintiff's Counsel:

I see my recollection was not very good, after looking over the records, as to that. I find on the minute book an entry of April 24, 1890: "The Vice-President submitted letter, dated 14th of April, from
1325 the General Counsel, in respect to the claim of Heman Clark, growing out of the construction of the Kansas City Extension, in which he states that, after a careful examination of the claim, he is of the opinion that Mr. Clark has no claim upon the Company, legal or equitable." It is my typewriting. I know my own work. I put it there; that was on the 24th of April. This matter was brought up before the directors on the report of the Executive Committee, and appears on our minutes of April 30, 1890. The communication from the Executive Committee on the minutes is dated April 24, 1890; it appears upon the minutes of the directors' meeting of April 30th, and it appears that there was no action
1326 taken upon it by the board.

HEMAN CLARK, recalled and examined by plaintiff's counsel, testified as follows:

Q. There has been some testimony given here in which, in reference to a lost telegram pretending to be signed by you, Mr. Miller was asked, "Give the words," and he answered, "I can't give the precise words, but I will give the substance as near the words as possible: 'Your understanding correct.

We will forfeit $40,000 if road not completed June 1st.'" Did you ever send or write such a telegram, or authorize anybody to write or send such a telegram, with those words? A. No, sir. I remember receiving a letter on March 19th from Mr. Miller speaking about the $40,000, after which I testified I had a conversation with Mr. Wadsworth, and he said he would waive it. It is my best recollection that Mr. Wadsworth was here in March and part of April, the time this contract was signed. After receiving this letter speaking about this $19,500 a mile and the $40,000, I saw Mr. Wadsworth in his office here. I saw him up until the weather got to be as I thought pretty warm; I know he had a fire a warm day in his office there, and he told me he was very feeble. I don't remember the date, but I had business other than this with him, and I saw him up to the time that he left his office.

CROSS-EXAMINATION by Defendant's Counsel:

I don't remember that these interviews that I had with Mr. Wadsworth were after he had returned from his trip to California. I cannot remember the time. I couldn't tell whether it was not after the 1st of April, 1886. I saw him two or three times a week up to the time he got so feeble he left his office. I do not remember about his going away on account of his health. I know he told me his health was very poor and he was very feeble. I don't remember that in the spring of 1886 he was away for some time. Perhaps he was. I think it is likely. I did receive this letter from Mr. Miller of April 19, 1886, about the mistake in the consideration expressed in the contract. I haven't any doubt about it. I remember that the difficulties expressed in that letter I went right to Mr. Wadsworth about and had them taken care of. Mr. Miller was not an important factor in this matter then. Mr. Wadsworth was here. Some

1330 time that I could get it attended to. I can't swear to the exact date he was here, or the exact date he went away. I will not swear positively that I did not send such a telegram to Mr. Miller as he and Mr. Kimball have testified to. I swear I have no recollection of it. If you have any such telegram I should like to see it.

REDIRECT-EXAMINATION by Plaintiff's Counsel:

Mr. Wadsworth at this interview stated after showing him this letter, about the $40,000, that the Railroad Company would waive that.

1331 RECROSS-EXAMINATION by Defendant's Counsel:

I say there was no agreement that $40,000 should be deducted from the price of $19,500 a mile if I had until August first to finish the road. That had been a preliminary talk, like perhaps a thousand preliminary matters that are talked before a contract, but don't enter into it. I had not agreed to that with Mr. Miller; it was simply a suggestion on their part. I did not agree to it. I don't know that my original proposition was to do it for $40,000 less, if I had until the 1st of August. My recollection is that there were various suggestions and propositions working back and forth between us, and when we
1332 finally settled down upon it we got the best trade we could, and that trade is what you find in the contract.

[THE TESTIMONY WAS THEREUPON CLOSED ON BOTH SIDES.]

Defendant's counsel thereupon moved the Referee 1333
to dismiss the complaint as to the first cause of action, on the ground that the action could not be maintained by the plaintiff upon the complaint in this action to recover upon the first cause of action stated in the complaint for the balance alleged to be due upon the contract between the plaintiff and the defendant railway company, of March 6, 1886, for the reason that the receipt or acknowledgement of satisfaction of March 9, 1888, whereby the plaintiff acknowledged that he had received from the defendant railway company at that time the sum of $173,532.49 in full satisfaction of the amount due on the estimates of the chief engineer of the railway company, and in full satisfaction of all claims and de- 1334
mands of every kind, name and nature, arising from or growing out of said contract of March 6, 1886, and the construction of said railroad, was a bar to such an action, and that this action could not be maintained until such acknowledgment of satisfaction was set aside, and that there were no allegations of any fraud or mistake, or of any deception or misrepresentation on the part of the defendant in regard to the said receipt or acknowledgment.

Also on the ground that the action could not be maintained under the first cause of action for an accounting by the defendant in respect to the $40,000 reserved to meet claims, as the action was not brought for that purpose or based upon the receipt or 1335
acknowledgement, but against it.

Also on the ground that by the express terms of the said receipt or acknowledgment of March 9, 1888, the plaintiff did agree to allow to the railway company $40,000 by way of forfeiture in case said railway was not completed by the first of June, 1887, and that said acknowledgment was a bar to the recovery of any part of the said sum by the plaintiff from the defendant railway company, and that the said railway company was not chargeable with the amount of the said forfeiture as deducted from the

1336 amount payable to the said plaintiff Clark at the time of the said acknowledgemnt of March 9, 1888.

Also on the ground that the defendant railway company was not chargeable with the amount charged to said Clark for nut locks furnished to him by the railway for use in the construction of the road agreed to be built under the said contract; and that the said receipt and acknowledgment of March 9, 1888, was a bar to the recovery of the said sum.

Defendant's counsel also moved to dismiss the complaint on the ground that the receipt and acknowledgment of March 9, 1888, signed by plaintiff, was an account stated
1337 and agreed to, and a payment in full of all claims and demands of the plaintiff, of every kind, name and nature arising from and growing out of the said contract of March 6, 1886, and of the construction of said railroad; and that it was an accord and satisfaction between the parties of and in respect to all such claims.

Defendant's counsel also moved to dismiss the complaint as to the cause of action for and in respect to the conversion by the defendant railway company of certain timber alleged to have been taken and used by the defendant railway company in June, 1888, after the completion of the contract, on the ground that said cause of action could not be united
1338 with the other causes of action upon the contract stated in the complaint as a cause of action in tort with causes of action upon contract; and on the ground that there was no testimony to maintain such cause of action, or any proof that the railway company had converted or appropriated to its own use any such timber.

Defendant's counsel moved to dismiss the complaint on the ground that the other causes of action stated in the complaint were not maintainable either upon the pleadings or proofs in the action.

The cause was thereupon submitted to the Ref-

eree, after argument by counsel for the respective parties, and thereafter the Referee announced his decision, and made his report and findings and conclusions of fact and law in the action, dated December 4, 1897, which was duly filed herein on the 14th day of December, 1897.

(*Pro ut* Referee's Report.)

The defendant duly excepted, and filed exceptions to the report, rulings and decisions of the said Referee, and also to his refusals to find and decide as requested by the defendant in the respects as to which he so refused to find and decide, as appears by the exceptions filed by the defendant in this case.

(*Pro ut* the same.)

Afterwards an order was made by the Court upon the application of the defendant on the 3d day of February, 1898, by which order it was directed that the said report of the said Referee be recommitted and returned to said Referee with directions to make and state his findings of fact and his conclusions of law in this action separately.

Thereupon the said Referee made a further report in said action containing a statement of his findings of fact and conclusions of law separately, and also his rulings and decisions as to and upon certain requests to find and decide as to matters of fact and conclusions of law submitted by the plaintiff and defendant respectively, which said report containing such findings, conclusions, rulings and decisions was filed in the office of the Clerk of this Court on the 18th day of February, 1898.

(*Pro ut* the same.)

The defendant thereafter and on the 24th day of February, 1898, filed with the Clerk and also delivered to the Referee exceptions to said report, and to said findings, conclusions of law, rulings and decisions of said Referee, and to his refusals to find

1342 and decide as requested by the defendant in the respects in which he did so refuse to find and decide; which exceptions are as follows:

FIRST.

The defendant, The Chicago, Milwaukee and St. Paul Railway Company, hereby excepts to the finding and decision of Hon. George Hoadly, the said Referee, contained in his report made and filed herein on the 18th day of February, 1898, to the effect that "the defendant failed to furnish the plaintiff with rights of way, as by said contract it had agreed to do, in time to enable the plaintiff to complete his contract prior to the first of June, 1887,
1343 or prior to the first of August, 1887; but on the contrary delayed the plaintiff in the performance of said contract at a point upon the said road known as Minnaville, until October 27, 1887, by reason of the neglect, failure and omission of the defendant to obtain the necessary right of way at said point so as to permit the construction of the road and the completion of the contract at said point;" and states as its ground of exception thereto that the defendant Railway Company did not fail to furnish to the plaintiff the rights of way as by said contract it had agreed to do in time to enable the plaintiff to complete his contract prior to the first of June, 1887, or prior to the first of August, 1887,
1344 and the defendant Railway Company did not delay the plaintiff in the performance of said contract at a point upon the said road known as Minnaville, until October 27, 1887, by reason of the neglect, failure or omission of the defendant to obtain the necessary right of way at said point so as to permit the construction of the road and of the completion of the contract at said point.

SECOND.

The said defendant also excepts to the finding, decision and conclusion of the said Referee that the

plaintiff was prevented from completing his contract on or prior to August first, 1887, and also on or prior to June 1, 1887, by the negligence, omission and fault of the defendant; and states as its ground for said exception that the plaintiff was not so prevented from completing his contract by the negligence or omission and fault of the defendant. 1345

THIRD.

The said defendant also excepts to the finding, decision and conclusion of the said Referee that there are no provisions in the contract which require that the plaintiff should use in the construction of the railroad under said contract, any patent nut-locks, and that the plaintiff never agreed that he should so use in the construction of the said railroad under said contract any patented nut-locks, and states, as its ground for said exception, that the provisions of the said contract do require that the plaintiff should use in the construction of the railroad under said contract patented or other nut-locks, and also that the plaintiff agreed that he would use such nut-locks in the construction of the said railroad, and did so use the same. 1346

FOURTH.

The said defendant also excepts to so much of the finding, decision and conclusion of the said Referee as contained in the 13th finding, that the plaintiff was paid by the defendant the sum of $213,532.49 mentioned in the writing or receipt set out in the said finding, less the sum of $40,000 claimed in said paper to be retained for forfeiture in not completing the performance of his work under said contract on or prior to June 1, 1887; and states as its ground for said exception that it appears by said writing or receipt or acknowledgment that the plaintiff was paid by the defendant, upon the signing of the said receipt or acknowledgment, the said sum of $213,532.49, less the sum of $40,000, as stated 1347

1348 therein, to be retained and deducted therefrom, and which, in and by the said instrument and agreement, it was agreed should be retained and deducted from the said sum of $213,532.49 as an indemnity against any claims that might be made against the said Railway Company for liens of workmen and claims of sub-contractors, and from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle, and other damages specified and mentioned in the said receipt, and that the said amount of $173,532.49 then and so paid by the defendant to the plaintiff was arrived at by deducting from the said sum of $213,532.49 the sum of $40,000 so retained and reserved as security and in-
1349 demnity against the claims therein provided for, and not by deducting the said sum of $40,000 charged as a forfeiture for not finishing or completing the said railroad by the first day of June, 1887, as specified and set out in said instrument.

FIFTH.

The said defendant Railway Company also excepts to so much of the finding, decision and conclusion of the said Referee as contained in his 14th finding, that the said receipt and paper therein referred to, contained an accurate, truthful and undisputed account of all dealings between the said parties, except in the matter of the $40,000 de-
1350 ducted for time forfeiture, the $9,558.63 for nut-locks embraced in the $3,626,865.20, and the lumber therein referred to; and states as its ground of the said exception that the said receipt and paper did contain an accurate, truthful and undisputed account of all dealings between the said parties concerning the amount due to the plaintiff on the estimates of the Chief Engineer of the Railway Company in reference to the construction of the said road, and of all claims and demands of the plaintiff against the defendant Railway Company, of every kind, name and nature arising from or growing out of the contract of March 6, 1886, and of the construc-

tion of said railroad, excepting the obligation of the 1351
Railway Company to account for the sum of $40,000 reserved and retained by the Railway Company as indemnity as aforesaid, and therein mentioned.

SIXTH.

The defendant Railway Company also excepts to the finding, decision and conclusion of the said Referee that at the time of the signing and delivery of the said paper or instrument before mentioned, the contents of the final certificate or estimate of the Chief Engineer under the contract were not known to the plaintiff or his agents other than by the reference thereto contained in said receipt of March 9, 1888, and states as its ground for said exception that the 1352
contents, details and amount of the said certificate were known to the plaintiff or his agent prior to or at the time of the signing and delivery of the said receipt or instrument.

SEVENTH.

The defendant Railway Company also excepts to to the finding, decision and conclusion of the said Referee that no other final settlement of accounts under said contract had been had between the plaintiff and the defendant at the time the said last mentioned paper was signed and delivered.

EIGHTH. 1353

The defendant Railway Company also excepts to so much of the finding, decision and conclusion of the said Referee as states that the question of the liability of the plaintiff for nut-locks, which had been referred to the Chief Engineer under the contract had not been passed upon by him, and that the said Chief Engineer had referred the question for opinion to the defendant's counsel, who had not, at said time, given his opinion in relation thereto; and states, as its ground for said exception, that the question of the said liability had been passed upon

1354 by the said Chief Engineer of the defendant Railway Company, and that the counsel of the defendant Railway Company had at that time given his opinion in relation thereto.

NINTH.

The defendant Railway Company also excepts to the finding, decision and conclusion of said Referee that no account was ever, otherwise than by said paper and receipt of said money, stated of the transactions under and connected with said contract between the plaintiff and the defendant; and states as its ground for said exception that such an account had been, prior to that time, stated of the transac-
1355 tions under and connected with the said contract between the plaintiff and defendant.

TENTH.

The defendant Railway Company also excepts to the finding, decision and conclusion of the said Referee, as contained in his said report, that in or about the months of March and April, 1888, the plaintiff was the owner of 97,000 feet, B. M., of bridge timber, then in the yard of the defendant at Chillicothe, and along the line of the railroad, and also to the finding and decision of the said Referee that the said lumber did not conform to the standard of the defendant and was not purchased by the
1356 defendant from the plaintiff or allowed for in the final certificates of the Chief Engineer under the contract in this action, to the plaintiff; and states as its ground for the said exception that there is no proof in this case that the plaintiff was the owner of the 97,000 feet of bridge timber in the months of March and April, 1888, in the yard of the defendant at Chillicothe and along the line of the railroad; or that said lumber did not conform to the standard of the defendant and was not purchased by the defendant from the plaintiff, or allowed to the plaintiff in the final certificate of the Chief Engineer under the contract.

ELEVENTH.

The defendant Railway Company also excepts to the finding, decision and conclusion of the said Referee that in or about the month of June, 1888, the defendant took possession of any such lumber and converted the same to its own use without the consent or knowledge of the plaintiff, and also to the finding and decision of the said Referee that the value of said timber at the time of the taking in June, 1888, was $2,425; and states as its ground for the said exception that there is no evidence in this case that the defendant Railway Company ever did, in or about the month of June, 1888, or at any other time, take possession of the lumber mentioned and described, or convert the same to its own use, without the consent or knowledge of the plaintiff, or that the value of the said lumber was, at the time of such alleged taking, in June, 1888, $2,425.

TWELFTH.

The defendant Railway Company also excepts to the conclusion of law stated by the said Referee in his said report, that the defendant is not entitled to charge the plaintiff, or to retain and deduct from the amount earned and payable to the plaintiff under the said contract, the sum of $40,000, as a forfeiture or liquidated damages for not completing the contract upon June 1st, 1887; and states as its ground for the said exception that under and by the terms of the said paper and instrument signed and executed by said Heman Clark on the 9th day of March, 1888, the said Clark agreed that by a supplemental contract he was to allow the Railway Company, by way of forfeiture, in case the railway was not completed by the first day of June, 1887, the said sum of $40,000, and that he did thereupon and thereby allow the said Railway Company the said sum of $40,000 as such forfeiture or liquidated damages for not completing the contract upon June first, 1887.

1360 THIRTEENTH.

The defendant Railway Company also excepts to the finding, decision and conclusion of the said Referee that under the facts proved in this case the plaintiff is not legally liable to the defendant for any damages for failure to complete the contract within the contract time or the time agreed upon, for the reason that the plaintiff was prevented by the negligence of the defendant and his omission to procure the necessary right of way, from completing the said work in such time; and states as its ground for the said exception that the plaintiff was not prevented by the negligence of the defendant or by his omission to procure the necessary right of way from
1361 completing the said work in such time, and that in and by the said receipt, acknowledgment and declaration signed and executed by the said Clark upon the 9th day of March, 1888, and in consideration of the sum of $173,532.49 then paid to him, he did agree that he was to allow the said Railway Company, by way of forfeiture in case said railway was not completed by the first day of June, 1887, the said sum of $40,000.

FOURTEENTH.

The said defendant Railway Company also excepts to the finding, decision and conclusion of the said Referee that the plaintiff is not liable to the defend-
1362 ant for the sum of $9,558.63, the cost of patent nut locks furnished by the defendant to the plaintiff and used by him in the performance of the said work; and states as its ground for the said exception, that by the terms and provisions of the said contract, the plaintiff was and is liable to the defendant for the said sum of $9,558.63, the cost of such nut locks furnished by the defendant to the plaintiff and used by him in the performance of said contract; and that by the terms and provisions of the said receipt, agreement and acknowledgment of the 9th day of March, 1888, the plaintiff acknowledged that the Railway

Company had paid to him, to apply on the said contract in money, material, labor and transportation, the sum of $3,626,865.20, and that in so far as the said sum included the sum of $9,558.63, charged to the plaintiff for such nut-locks, used by him in the performance of the said contract, the said receipt and acknowledgment was an acknowledgment that he was chargeable with the said sum and that he had received the said sum of money to apply on said contract.

FIFTEENTH.

The said defendant Railway Company also excepts to the decision and conclusion of the said Referee, that there was no obligation imposed by the contract upon the plaintiff to furnish and pay for patent nut-locks, to be used in the construction of the said road; and states as its ground for the said exception that there was, by the provisions of the said contract, such obligation imposed upon the plaintiff to furnish and pay for patent nut-locks to be used in the construction of said road.

SIXTEENTH.

The defendant Railway Company also excepts to the finding, decision and conclusion of the said Referee that the plaintiff is not legally indebted to the defendant in any sum whatever for patent nut-locks furnished by the defendant and used in the construction of the railroad under the said contract; and states as its ground for the said exception, that such nut-locks had been furnished to the plaintiff by the defendant Railway Company, and had been paid for by the defendant, and that by the provisions of the said contract the plaintiff was liable to pay therefor to the defendant, and also that in and by the said agreement, receipt or acknowledgment of March 9, 1888, he acknowledged that he was chargeable with the amount paid by the defendant for the said nut locks furnished to the plaintiff and

1366 used by him in the construction of the said railroad under said contract.

SEVENTEENTH.

The defendant Railway Company also excepts to the decision and conclusion of the said Referee that the plaintiff is entitled to recover from the defendant the sum of $2,425, with interest from June first, 1888, for the conversion by the defendant of lumber belonging to the plaintiff; and states as its ground for said exception that there is no proof in this case that the defendant Railway Company ever did convert to its own use any lumber belonging to the plaintiff; and it also excepts to the said decision and
1367 conclusion of the Referee, on the ground that the plaintiff is not entitled to have or maintain this action for the recovery of any such lumber, or to make any claim therefor or in respect thereto in this action.

EIGHTEENTH.

The said defendant Railway Company also excepts to the finding, decision and conclusion of the said Referee that "the signing and delivery by the plaintiff of the receipt on or about the ninth day of March, 1888, and the acceptance of the check of $173,532.49 under the facts and circumstances proved in this case, were, as to the two sums of
1368 $9,558.63 charged for nut locks, and $40,000 charged by way of forfeiture for nonperformance in time, wholly without consideration and in violation of the contract between the parties, and do not constitute any bar to the recovery by the plaintiff for the sums of $9,558.63 and $40,000 otherwise as due under the contract," and states as its ground for the said exception that the signing and delivery by the plaintiff of the said receipt on or about the 9th day of March, 1888, and the acceptance of the said check of $173,532.49 was a good and sufficient consideration for the allowance by the plaintiff to the defendant of the said sum of $9,558.63 charged for nut

locks, and of the said sum of $40,000 charged by way 1369
of forfeiture for nonperformance in time, and that the charge of the said sums was not in violation of the contract between the parties, and that the signing and delivery by the plaintiff of the said receipt and acknowledgment on the 9th day of March, 1888, and the acceptance of said check for $173,532.49 does constitute a bar to the recovery by the plaintiff in this action for or of the said sums of $9,558.63 and $40,000.

NINETEENTH.

The said defendant Railway Company also excepts to the decision and conclusion of the said Referee "that the signing and delivery of said receipt and 1370
the acceptance of the check thereunder do not constitute a legal payment or accord and satisfaction of the said sums of $9,558.63 and $40,000, or either of them or any part of either of them, and states as its ground for the said exception that the signing and delivery of the said receipt and the acceptance of the said check for $173,532.49 thereunder do constitute in law and effect, as well as in fact, a legal payment and an accord and satisfaction of the said sum of $9,558.63 and of the said sum of $40,000, and of each of them.

TWENTIETH.

1371
The said defendant Railway Company also excepts to the decision and conclusion of law of the said Referee "that no account of the transactions under the contract mentioned and referred to and of the claims sued on in this action was ever had or stated between the parties to this action otherwise than by said receipt or paper of March 9, 1888," and states as its ground for the said exception that an account of the said transactions and of the claims sued on in this action was had and stated between the parties to this action.

1372 TWENTY-FIRST.

The said defendant Railway Company also excepts to the finding, decision and conclusion of the said Referee that the plaintiff is entitled to recover the amount certified by the Chief Engineer, of $3,895,-793.79, without the deduction claimed by the defendants for nut-locks, of $9,558.63, and without allowance to the defendant by way of forfeiture for non-completion of the railway on the first day of June, 1887, and is also entitled to recover for timber used by the defendant on the 30th day of June, 1888, to the amount of $2,425, with interest from June 30th, 1888, the whole amounting at the date of said report, namely, the 4th day of December, 1897, to the
1373 sum of $81,305.88, for which, with interest from this date and disbursements, the plaintiff is entitled to judgment less the amount paid by the defendant in excess of the reserved $40,000; and states as its ground for the said exception that the plaintiff is not entitled, under or pursuant to any of the findings of fact made by the Referee in this case, or upon the proofs or allegations therein, to recover the said amount so certified by the Chief Engineer, without the deduction claimed by the defendant for nut-locks, and without allowance to the defendant by way of forfeiture, for non completion of the railway on the first day of June, 1887.

1374 TWENTY-SECOND.

The defendant Railway Company also excepts to the decision and conclusion of the said Referee that there should therefore be judgment for the plaintiff for the sum of $80,479.35, with interest and costs, as stated in the report of said Referee.

TWENTY-THIRD.

The said defendant Railway Company also excepts to the refusal of the said Referee to find as requested by the defendant, that the said check for $173,532.49 was delivered, and the said sum of $173,532.49

was paid by the said defendant Railway Company 1375
to the said Heman Clark in full satisfaction of the amount due to said Clark on the estimates of the Chief Engineer of the Railway Company, and in full satisfaction of the amount due to said Clark on the estimates of the Chief Engineer of the Railway Company and in full satisfaction of all claims and demands of every kind, name and nature arising from or growing out of the said contract of March 6, 1886, and of the construction of the said railroad, excepting the obligation of said Railway Company to account for the said $40,000 mentioned as reserved to meet claims as stated in said acknowledgment, and not otherwise; and states as its ground for the said excep- 1376
tion that in and by the said receipt, declaration and acknowledgment signed and executed by the said Heman Clark and delivered by him to the said Railway Company, he acknowledged that the said sum of $173,532.49 therein mentioned was received by him in full satisfaction of the amount due to him on the said estimates of the Chief Engineer of the Railway Company, and in full satisfaction of all claims and demands of every kind, name and nature, arising from or growing out of the said contract of March 6, 1886, and of the construction of the said railroad, excepting the obligation of said Railway Company to account for the said $40,000.

1377

TWENTY-FOURTH.

The defendant Railway Company also excepts to the refusal of the said Referee to find and decide as requested by the defendant that the defendant Railway Company has duly paid, for or on account of the said Heman Clark, in money, materials, labor, transportations and other charges for which the said Heman Clark was liable, the whole amount earned by and due to him for all work performed and materials furnished by him under the said contract made between the said Railway Company and the

1378 said Heman Clark, dated March 6, 1886, for the construction of the said railroad, including all extra work performed and material furnished by him, of every kind and description, in the construction of said railroad agreed to be built by him; and states as its ground for the said exception that the said Railway Company has paid to the said Clark, in money, materials, labor, transportation and other charges for which the said Clark was liable, the whole amount earned by and due to him for work done by him under the said contract, for the construction of the said railroad, including all extra work performed and material furnished by him, of every kind and description, and that the said plain-
1379 tiff Clark has so acknowledged and declared in writing that he has received full payment and satisfaction for the amount due to him on the estimates of the Chief Engineer for all work performed under the said contract, including all extra work of every kind, in full satisfaction of all claims and demands of every kind, name and nature, arising from and growing out of the said contract and of the construction of the said railroad.

TWENTY-FIFTH.

The said defendant Railway Company also excepts to the refusal of the said Referee to find and decide as a conclusion of law, as requested by the
1380 defendant Railway Company, that in and by the receipt, declaration and acknowledgment signed and executed by the plaintiff Heman Clark on the 9th day of March, 1888, mentioned and set out in the findings of fact made by the said Referee and by the statements therein contained, an account was duly stated and agreed to by and between the plaintiff Heman Clark and the defendant Railway Company concerning the amount and value of the work done and material furnished by the plaintiff under the contract between said Clark and the said Railway Company, dated March 6, 1886, for the construction of the railroad thereby agreed to

be built, including all extra work performed and material furnished of every kind and description, whereby it was stated and agreed that the amount and value of said work so performed and material furnished, including all extra work so performed and material furnished of every kind and description in the construction of said road, was the sum of $3,895,798.79, and that the plaintiff was also entitled to be credited with the further sum of $34,598.90 for material sold by him to said Railway Company, and certain rebates and other matters of that description; and that the said defendant Railway Company had paid to him, the said Clark, to apply on said contract, in money, material, labor and transportation, the sum of $3,626,865.20, and that by the terms of Section 4 of Article XIII. of said contract, the said Clark was to be charged in addition for transportation the sum of $50,000, and by a supplemental contract had agreed to allow the said Railway Company by way of forfeiture in case the said railroad was not completed by the first of June, 1887, the further sum of $40,000; and whereby it was stated and agreed that the amount then due to said Clark under said contract was the sum of $213,532.49, and whereby it was further stated and agreed that $40,000 of the amount so due under said contract should be reserved and set aside by said Railway Company as an indemnity or security to it for liens of workmen and claims of sub contractors, and from all damages as specified and stated in said acknowledgment, from and against which the said Clark had agreed to save the said Railway Company free and harmless; and that there was then payable on said contract to the said Clark by the said Railway Company the sum of $173,532.49; and states as its ground for the said exception that there was thereby an account duly stated and agreed to in respect to the said matters as therein stated.

1384 TWENTY-SIXTH.

The said defendant Railway Company also excepts to the refusal of the said Referee to find and decide as a conclusion of law as requested by said defendant, that in and by the payment of the said sum of $173,532.49 made by said defendant Railway Company to the said Clark on said 9th day of March, 1888, upon the execution and delivery by him to said Railway Company of the receipt, declaration and acknowledgement before mentioned and set out in the findings of the Referee, whereby the said plaintiff Clark acknowledged that he had received from the defendant Railway Company the said sum of $173,532.49 in full satisfaction for the amount due
1385 him on the estimates of the Chief Engineer, and in full satisfaction of all claims and demands of every kind, name and nature arising from or growing out of the said contract of March 6, 1886, and of the construction of the said railroad, excepting the obligation of the Railway Company to account for the said sum of $40,000 so reserved as aforesaid, there was an accord and satisfaction between the said Clark and the defendant Railway Company as to the amount due by said Railway Company upon the estimates of the Chief Engineer and of the amount and value of all work done and material furnished by said Clark under and by the said contract, including all extra work performed and ma-
1386 terial furnished of every kind and description, and a payment by said Railway Company to said Clark of said sum of $173,532.49 in full satisfaction of the amount due to said Clark from said Railway Company upon said contract, and for all claims and demands of every kind, name and nature, in favor of said Clark against said Railway Company, arising from or growing out of the said contract and of the construction of the said railroad and of the amount due to said Clark on the estimates of the Chief Engineer, excepting the obligation of the Railway Company to account for the sum of $40,000 reserved

as aforesaid; and states as its grounds for the said 13
exception that the said receipt and acknowledgment, and the payment of the said sum of $173,-532.49, was an accord and satisfaction and payment in full of the said claims and demands as aforesaid.

TWENTY-SEVENTH.

The said Railway Company also excepts to the refusal of the said Referee to find and decide as a conclusion of law as requested by the said defendant Railway Company, that the plaintiff is not entitled to recover for or from the defendant the sum of $2,425 or any other sum for or on account of any timber belonging to the plaintiff, alleged to have 1388
been converted by the defendant Railway Company to its own use in the month of June, 1888, or at any other time; and states as its ground for the said exception that there is no proof in this case that the defendant Railway Company ever did convert to its own use any timber belonging to the plaintiff, of the value of $2,425 or any other sum; and also on the ground that the plaintiff is not entitled to have and maintain this action for the recovery of any such timber so alleged to have been converted by the defendant Railway Company to its own use, or to have a recovery for the said sum in this action.

TWENTY-EIGHTH.

1389
The defendant Railway Company also excepts to the refusal of the said Referee to find and decide as a conclusion of law, as requested by said defendant, that the defendant Railway Company is entitled to recover of the plaintiff Heman Clark the sum of $521\frac{75}{100}$, together with the costs of this action, and states as its grounds for the said exception that, upon the findings of fact made by the Referee upon the proofs in this action, the defendant Railway Company is entitled to recover from the plaintiff the said sum of $521\frac{75}{100}$, together with the costs of this action.

1890

TWENTY-NINTH.

The defendant Railway Company also excepts to the refusal of the said Referee to find as requested by the defendant in its "FIRST," "SECOND" and "THIRD" requests to find, submitted to the Referee prior to the making of his second report, and it also excepts to the refusal of the said Referee to find as stated in the "NINTH" request to find made by the defendant to the said Referee.

THIRTIETH.

The defendant Railway Company also excepts to the refusal of the Referee to find as requested by the said defendant as aforesaid to the effect as stated in
1391 the "FOURTEENTH" request to find made and submitted by the defendant as aforesaid.

THIRTY-FIRST.

The defendant Railway Company also excepts to the refusal of the said Referee to find as requested by the defendant as contained in the "FIFTEENTH" request made by the defendant to the said Referee as aforesaid.

THIRTY-SECOND.

The said defendant Railway Company also excepts to the refusal of the said Referee to find and decide as requested by the defendant Railway Company in
1392 "SEVENTEENTH" and "EIGHTEENTH" requests made by the said defendant to the said Referee as aforesaid.

THIRTY-THIRD.

The said defendant Railway Company also excepts to the refusal of the said Referee to find and decide as contained in the "TWENTY-SIXTH" request submitted by the said defendant to the said Referee as aforesaid.

THIRTY-FOURTH.

The said defendant Railway Company also excepts to the refusal of the said Referee to find and decide

as requested by the defendant as contained in the "TWENTY-SEVENTH" request, made and submitted by the defendant as aforesaid.

THIRTY-FIFTH.

The defendant Railway Company also excepts to the refusal of the said Referee to find and decide as contained in the "TWENTY-EIGHTH" request, made and submitted by the defendant to the said Referee as aforesaid.

THIRTY-SIXTH.

The defendant Railway Company also excepts to the refusal of the said Referee to find and decide as requested by the said defendant as contained in the "TWENTY-NINTH" request made and submitted by the said Referee as aforesaid.

THIRTY-SEVENTH.

The said defendant Railway Company also excepts to the refusal of the said Referee to find and decide as requested by the said defendant as contained in the "THIRTIETH" request made and submitted by the said defendant to the said Referee as aforesaid.

THIRTY-EIGHTH.

The said defendant Railway Company also excepts to the refusal of the said Referee to find and decide as requested by the defendant as contained in the "THIRTY SECOND" request so to find and decide, to the effect that "such nut-locks are a necessary part of the track material required for the construction and finishing in the most substantial and workmanlike manner, of the work necessary to be done in the construction and completion of a line of railroad."

THIRTY-NINTH.

The said defendant Railway Company also excepts to the refusal of the said Referee to find and decide

1396 as requested by the defendant, that "such nut-locks are necessary to be used to place and well bolt the splices upon the rails agreed to be laid, and to do the work of laying said tracks in the most approved manner."

FORTIETH.

The defendant Railway Company also excepts to the refusal of the said Referee to find and decide as requested by the defendant that "in the construction of the lines of the defendant Railway Company then in existence, nut-locks had been used to a large extent, and they were a standard of the said Chicago, Milwaukee and St. Paul Railway Company,
1397 and were then in general use upon other lines of railroad throughout the United States."

FORTY-FIRST.

The defendant Railway Company excepts to the refusal of the said Referee to find and decide as requested by the defendant, that "the defendant Railway Company did not fail to procure the necessary right of way for the construction of the railroad agreed to be built by the plaintiff under the said contract of March 6, 1886, at or near Minnaville, Missouri, at the crossing of the Hannibal and St. Joseph Railroad, in such time as not to delay the plaintiff in the completion of the work of con-
1398 struction of the said railroad at the said crossing."

FORTY-SECOND.

The defendant Railroad Company also excepts to the refusal of the said Referee to find and decide as requested by the defendant, and as stated in its "THIRTY-SIXTH" request made as aforesaid that "the right of way for the line of railroad of the defendant Railway Campany at Minnaville was procured by the defendant Railway Company in July, 1886, and the point and place and method of crossing of the railroad of the defendant Railway Com-

pany with the railroad of the Hannibal and St. Joseph Railroad at the said place was arranged for and completed by and at the time that the plaintiff was ready to lay the track at that place upon the line of the defendant's railroad agreed to be built under and by the said contract of March 6, 1886."

FORTY-THIRD.

The defendant Railway Company also excepts to the refusal of the said Referee to find and decide as requested by the defendant in its "THIRTY-SEVENTH" request to find, and decide that "the defendant Railway Company did not in the month of June, 1888, or at any other time, without the knowledge or consent of the plaintiff, wrongfully or otherwise, take possession of any timber belonging to the plaintiff, or convert the same to its own use for the purposes of repairing a washout, or otherwise."

FORTY-FOURTH.

The defendant Railway Company also excepts to the refusal of the said Referee to decide as a conclusion of law as requested by the defendant that "the receipt, declaration and acknowledgment signed and executed by the plaintiff Clark on the 9th day of March, 1888, mentioned and set out in the findings of fact made by the said Referee, and the statement therein contained and recited of the amount earned by and paid to said Clark by the defendant Railway Company, was and is an account stated and agreed to by and between the said plaintiff Clark and the defendant Railway Company concerning the amount and value of the work done and material furnished by the said plaintiff under the said contract made between the said Heman Clark and the said defendant Railway Company dated March 6, 1886, for the construction of the railroad thereby agreed to be built by the plaintiff, including all extra work performed and materials furnished by him of every kind and description, and of the credits to which the

1402 plaintiff was entitled for materials sold by him to said Railway Company, and rebates, and other matters of that description; and of the amount which the said Railway Company had paid to the said Heman Clark to apply on the said contract, in money, material, labor and transportation, and of the amount with which he was chargeable for transportation under the said contract, and the amount with which he was also chargeable by reason of the supplemental contract or agreement, for not completing the said railroad by the first day of June, 1887, whereby it was stated and agreed that the amount then due to the said Heman Clark on the said contract was the sum
1403 of $213,532.49, and whereby it was further agreed that $40,000 of the amount so due under said contract by said Railway Company to the said plaintiff Clark should be reserved and set aside by said Railway Company as an indemnity or security to it for the payment of claims against said Heman Clark, or against said Railway Company for liens of workmen and claims of sub-contractors of said Clark, and from all damages specified in the said acknowledgment, from and against which the said Clark had agreed to save the said Railway Company free and harmless, and that there was then payable on said contract to said Clark by said Railway Company, the sum of $173,532.49;" and it states as its ground for said ex-
1404 ception that the said receipt, declaration and acknowledgment and the statement therein contained and recited as aforesaid was and is an account stated and agreed to as aforesaid.

FORTY-FIFTH.

The said defendant Railway Company also excepts to the refusal of the said Referee to find and decide as a conclusion of law as requested by the said defendant, that "In and by the payment of the said sum of $173,532.49, made by said defendant Railway Company to said Heman Clark, on said ninth day of March, 1888, upon the execution and delivery by

him to the said Railway Company of the said receipt, declaration and acknowledgment hereinbefore mentioned, there was an accord and satisfaction between the said plaintiff and the said defendant Railway Company as to the amount due by said Railway Company to the plaintiff upon the estimates of the Chief Engineer of said Railway Company, and of the account and value of all work done and material furnished by said Clark under said contract between said Clark and said Railway for the construction of said railroad agreed to be built by the plaintiff as aforesaid, including all extra work performed and material furnished of every kind and description, and the payment by said Railway Company of said sum of $173,532.49 in full satisfaction of the amount due to him from said Company as aforesaid, except the obligation of said Railway Company to account for the sum of $40,000 reserved by said Railway Company as an indemnity against claims which might be made against said company for liens of workmen and claims of sub-contractors and other claims for damages as specified in said receipt or acknowledgment;" and the defendant states as the ground of its said exception that the said payment of said sum of $173,532 49 as aforesaid was in law and in fact an accord and satisfaction between the plaintiff and the said defendant Railway Company as aforesaid.

FORTY-SIXTH.

The defendant Railway Company also excepts to the refusal of the said Referee to decide as a conclusion of law as requested by the said defendant, that "The plaintiff is not entitled to recover of or from the defendant the sum of $2,425, or any other sum, for or on account of any timber belonging to the plaintiff, alleged to have been converted by the said defendant Railway Company to its own use in the month of June, 1886, or at any other time."

1408 FORTY-SEVENTH.

The defendant Railway Company also excepts to the refusal of the said Referee to hold and to decide as a conclusion of law as requested by the said defendant, that "In and by the said receipt and acknowledgment signed and executed by said Heman Clark on the 9th day of March, 1888, the said plaintiff Clark agreed to accept the said sum of $173,532.49 therein mentioned, and then paid to him by the defendant Railway Company in full satisfaction of the amount due to him by the said Railway Company on the estimates of the Chief Engineer of the Railway Company and in full satisfaction of all claims
1409 and demands of said Clark against said Railway Company of every kind, name and nature arising from and growing out of said contract of March 6, 1886, and of the construction of the said railroad thereby agreed to be built, except the obligation of said Railway Company to account for said sum of $40,000 reserved to meet claims as provided in said instrument;" and states as its ground for the said exception that the said Clark did in and by the said receipt and acknowledgment hereinbefore referred to agree to accept the said sum of $173,532.49 then paid to him in full satisfaction as aforesaid.

FORTY-EIGHTH.

1410 The said Railway Company also excepts to the refusal of the said Referee to hold and decide as a conclusion of law, as requested by the said defendant, that "The said sum of $173,532.49 then paid by said Railway Company to said plaintiff Clark, and received and collected by him, was a good and valuable consideration for the execution and delivery of said instrument by him and for said agreement by said Clark;" and states as its ground for said exception that the payment of the said sum of $173,532.49 by the said Railway Company to the said Clark was in law and in fact a good and valuable consideration

for the execution and delivery of said instrument and for the said agreement. 1411

FORTY-NINTH.

The said defendant Railway Company also excepts to the refusal of the said Referee to hold and decide as a conclusion of law as requested by the said defendant, that "In and by the said receipt and acknowledgment signed by said plaintiff, the said Clark, as far as he could legally bind himself for the consideration recited in said paper, accepted the said sum of $173,532 49 as in full, as therein stated, except as to the sum of $40,000 reserved to meet his guaranty recited in said receipt; and so far as his agreement and signature could give it force agreed and accepted these amounts as establishing that he had no claim for nut locks and had credited the Railway Company with $40,000, because of the non-completion of the railway by the first of June, 1887;" and the defendant states as its ground for the said exception that the said Clark did accept the said sum of $173,532.49 as in full, as therein stated; and also agreed and accepted the said amount as establishing that he had no claim for nut locks and had credited the Railway Company with $40,000, because of the non-completion of the railway by the first of June, 1887. 1412

FIFTIETH. 1413

The said defendant Railway Company also excepts to the refusal of the said Referee to hold and decide as a conclusion of law as requested by the said defendant, that "It is of no value or importance in this consideration that the plaintiff Clark claims to have signed the said receipt improvidently and without due consideration. He is bound by it so far as he could legally bind himself from retraction, quite as much as if he had taken days for its consideration, been advised by counsel, and was under no pecuniary stress pressing him to accept a smaller sum than

1414 was due;" and states as its ground for said exception that the matters stated in the said request are well founded in law.

FIFTY-FIRST.

The said defendant Railway Company also excepts to the refusal of the Referee to hold and decide as a conclusion of law as requested by the said defendant, that "The agreement made by said plaintiff Clark with said Railway Company to forfeit the sum of $40,000 if said railroad agreed to be built was not completed by the first day of June, 1887, was supported by a valuable consideration and was intended to be, and was, in its essential nature, liqui-
1415 dated damages;" and states as its ground for said exception that the said agreement was supported by a valuable consideration and was intended to be and was, in its essential nature, liquidated damages.

FIFTY-SECOND.

The defendant Railway Company also excepts to the refusal of the said Referee to hold and decide as a conclusion of law as requested by the defendant Railway Company, that "The said receipt and acknowledgment of March 9, 1888, executed by said Heman Clark as aforesaid in consideration of the said sum of $173,532.49 then paid to him by the defendant Railway Company and the accept-
1416 ance by said Clark of the payment of the said sum to him by said Railway Company, and its retention by him, was and is a bar to the recovery by the plaintiff in this action, of the amount charged to the plaintiff by the defendant Railway Company for nut locks; and of the amount of the said forfeiture of $40,000 for not finishing the said railroad agreed to be built by the first day of June, 1887;" and states as its ground for said exception that the said receipt and acknowledgment and the acceptance by the said Clark of the said payment and its retention by him was, and is, such a bar to the recovery by the plaintiff in this

action of the amount charged to him for nut locks and of the amount of the said forfeiture of $40,000.

The defendant Railway Company also excepts to the refusal of the said Referee to hold and decide as a conclusion of law as requested by the defendant, that "The plaintiff cannot maintain this action upon the complaint, or the amended complaint therein, for the recovery by him from the defendant of the amount charged to him for nut locks used by him in the construction of the railroad agreed to be built by him, as provided by said contract of March 6, 1886, between the plaintiff and the defendant Railway Company; or for the recovery of the amount of the forfeiture of $40,000 agreed to by the said plaintiff, if the said railroad so agreed to be built was not completed by the first day of June, 1887;" and it states as its ground for the said exception that the plaintiff cannot maintain this action upon the complaint, or amended complaint therein, for the said amounts or claims, or either of them.

FIFTY-THIRD.

The defendant Railway Company also excepts to the refusal of the said Referee to decide and hold as requested by the defendant, that "The plaintiff is not entitled to recover from the defendant Railway Company the amount charged to him for nut locks used in the construction of said railroad agreed to be built by him, as provided by said contract of March 6, 1886;" and states as its ground for the said exception that the plaintiff is not as a matter of law so entitled to recover from the defendant the amount so charged to him for nut locks.

FIFTY-FOURTH.

The said defendant Railway Company also excepts to the refusal of the said Referee to hold and decide as a conclusion of law as requested by the said defendant, that "The plaintiff is not entitled to recover

1420 from the defendant Railway Company in this action the amount of said forfeiture of $40,000 for not completing said road so agreed to be built by the first day of June, 1887;" and states as its ground for the said exception that the plaintiff is not as a matter of law entitled to recover from the said defendant in this action the amount of said forfeiture.

FIFTY-FIFTH.

The defendant Railway Company also excepts to the decision and conclusion of the said Referee as a matter of law as requested by the defendant, that "There is no proof that the defendant Railway Com-
1421 pany wrongfully took possession of, or converted to its own use, any timber belonging to the plaintiff, without his knowledge or consent, in the month of June, 1888, or at any other time;" and states as its ground for the said exception that there is no proof whatever in this action that the said defendant Railway Company ever did wrongfully take possession of or convert to its own use any timber belonging to the plaintiff, without his knowledge or consent in the month of June, 1888, or at any other time.

FIFTY-SIXTH.

The defendant Railway Company also excepts to
1422 the refusal of the said Referee to hold and decide as a matter of law as requested by the said defendant, that "The plaintiff is not entitled to, and cannot maintain, this action for the recovery of the value of any timber alleged to have been taken by the defendant Railway Company, and converted to its own use, without the knowledge or consent of the plaintiff;" and states as its ground for said exception that the cause of action for such alleged taking and conversion which is in tort, cannot be united with the other causes of action stated in the complaint, which are upon contract.

FIFTY-SEVENTH.

The defendant Railway Company also excepts to the refusal of the said Referee to hold and decide as a conclusion of law as requested by the said defendant, that "The plaintiff is not entitled to recover of the defendant the said sum of $2,425, or any other sum, as or for the value of any timber alleged to have been taken and converted by the defendant to its own use in the month of June, 1888, or at any other time;" and states as its ground for the said exception that the plaintiff is not as a matter of law entitled to recover of the defendant the said sum or any other sum for the value of any such timber alleged to have been so taken and converted by the defendant to its own use.

FIFTY-EIGHTH.

The defendant Railway Company also excepts to the refusal of the said Referee to hold and decide as a matter of law as requested by the defendant, that "The plaintiff is not entitled to recover of or from the defendant Railway Company any sum whatever for, upon or by reason of any of the matters or things alleged in the complaint in this action, or in the amendments to the complaint, or the amended complaint;" and states as its ground for the said exception that the plaintiff is not as a matter of law so entitled to recover from the defendant Railway Company any sum whatever.

FIFTY-NINTH.

The defendant Railway Company also excepts to the refusal of the said Referee to decide and hold as requested by the defendant as a conclusion of law, that "The defendant Railway Company is entitled to recover of and from the plaintiff the sum of $521.75, with interest thereon, amounting in all to the sum of $826.53; and is entitled to judgment therefor against the plaintiff, together with its costs and disbursements of this action;" and states as its ground for

1426 the said exception that the defendant Railway Company is as a matter of law so entitled to recover from the defendant Railway Company the said sum, with interest and costs.

And forasmuch as the matters and facts aforesaid, and the decisions of the Referee in the trial of the action, do not appear of record. the defendant prays that this case and bill of exceptions may be allowed and settled; and it is settled and allowed accordingly.

GEO. HOADLY,
Referee.

1427 It his hereby consented that the foregoing case and bill of exceptions be settled and allowed by the Referee as hereinabove stated and contained.

BANGS, STETSON, TRACY & MACVEAGH,
Defendant's Attorneys.

KELLOGG, ROSE & SMITH,
Attorneys for Plaintiff.

(Endorsed)—Cir. Ct. U. S., Southen District of New York.—Heman Clark *vs.* Chicago, Milwaukee & St. Paul Railway Co.—Case and Defendant's Bill of Exceptions on trial before Referee.—Bangs, Stetson, Tracy & MacVeagh, Defendant's Attorneys, 15 Broad Street. N. Y.—U. S. Circuit Court.—Filed Mar. 25, 1898.—John A. Shields, Clerk.

1428

UNITED STATES CIRCUIT COURT, 1420

SOUTHERN DISTRICT OF NEW YORK.

HEMAN CLARK vs. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.	Defendant's Assignment of Errors. Prayer for Reversal, &c.

Afterwards, to wit, on the 20th day of April, in 1430
the year, 1898, at the April Term of the Circuit Court of the United States for the Southern District of New York, in the City of New York, comes the said defendant, The Chicago, Milwaukee and St. Paul Railway Company, by Bangs, Stetson, Tracy & MacVeagh, its attorneys, and says that in the record and proceedings in the above entitled action in the said Circuit Court of the United States, in which action a judgment was entered in said Circuit Court of the United States for the Southern District of New York on the sixth day of April, 1898, in favor of said Heman Clark against said Chicago, Milwaukee and St. Paul Railway Company for the sum of $88,084.86 there is mani-
fest error, and manifest errors have happened to the 1431
great damage of the said Chicago, Milwaukee and St. Paul Railway Company, in this, to wit:

FIRST.—That the said Circuit Court erred in overruling, upon the trial and hearing of the said action, each and every of the several exceptions taken and filed by the defendant to the report and reports of the Hon. George Hoadly, the Referee appointed in this action, and to each of them.

SECOND.—That the said Circuit Court erred as aforesaid in overruling each and every of the sev-

1432 eral exceptions taken and filed by the defendant, to each and every of the several findings of fact and conclusions of law made by the said Referee, as contained in his said report and reports, filed in the said action on the 14th day of December, 1897, and the 18th day of February, 1898, which were made and adopted as the findings of fact and conclusions of law of the Court upon the trial of this action.

THIRD.—That the said Court erred as aforesaid in overruling each and every of the several exceptions taken and filed by the defendant to each of the several refusals of the said Referee to find and decide as severally requested by the defendant, as to which
1433 refusals the defendant made and filed exceptions as appears by the record herein.

FOURTH.—That the said Circuit Court erred in refusing to make upon the trial and hearing of this action as aforesaid, any and each of the several findings of fact, and any and each of the several conclusions of law, which, as stated in the report of the said Referee, were requested by the defendant, and which were refused by the said Referee.

FIFTH.—That the said Circuit Court erred, upon the trial and hearing of this action as aforesaid, in making each and every of the several rulings and
1434 decisions of the said Referee, as contained and appearing in the case and bill of exceptions made and filed herein upon the trial and hearing before the said Referee, and each of the decision or decisions, findings and conclusions of law of the said Referee as stated and contained in his said reports, the rulings, decisions, findings of fact and conclusions of law of the Court in this action.

SIXTH.—That the said Court erred as aforesaid in holding and deciding that the plaintiff was entitled to judgment, or to recover of the defendant the sum of $80,479.35, with interest from the 4th day of De-

cember, 1897, together with the costs and disburse- 1435
ments of this action, notwithstanding the several exceptions filed by the defendant to the report and reports of the said Referee filed in this action on the 14th day of December, 1897, and the 18th day of February, 1898, as aforesaid.

SEVENTH.—That the said Circuit Court erred in holding and deciding upon the hearing and trial of this action as aforesaid, that the findings of fact made by the said Referee as contained in his said report made and filed in this action on the 18th day of February, 1898, authorized said judgment for the plaintiff.

1436

EIGHTH.—That the said Circuit Court erred upon the trial and hearing of this action in denying the defendant's motion to set aside the said report of the said Referee, and for judgment thereon for the defendant, on the ground that the findings of fact made by the said Referee, as contained in his said report made and filed therein on the 18th day of February, 1898, did not authorize such judgment for the plaintiff.

NINTH.—That the said Circuit Court erred upon the trial and hearing of this action as aforesaid in denying the motion made by the defendant to set aside the said report or reports of the said George 1437
Hoadly, Referee, and for judgment thereon for the defendant, on the ground that the Referee's conclusions of law as set forth in said Referee's report filed herein on the 18th day of February, 1898, and numbered 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, respectively, are not nor is any of them sustained by any finding of fact set forth in said report.

TENTH.—That the said Circuit Court also erred as aforesaid in denying the defendant's motion upon the trial and hearing of this action, to set aside the said report or reports of the said Referee, and for

judgment thereon for the defendant on the ground that the Referee's conclusions of law stated and contained in his said report filed herein on the 18th day of February, 1898, are erroneous.

ELEVENTH.—The said Circuit Court also erred in denying the defendant's motion made upon the trial and hearing of this cause as aforesaid, to set aside the said report or reports of the said Referee and for judgment thereon for the defendant on the ground that the Referee's findings of fact contained in his said report filed herein on the 18th day of February, 1898, as to the first cause of action, entitled the defendant to judgment dismissing the complaint in this action as to the said first cause of action.

TWELFTH.—The said Circuit Court also erred in denying the defendant's motion made upon the trial and hearing of this action by the Court as aforesaid, to set aside the said report or reports of the said Referee, and for judgment thereon for the defendant on the ground that the Referee's findings of fact as to the cause of action for lumber alleged to have been used by the defendant in June, 1888, are not sustained by the evidence, and that there is no evidence to support the said findings of fact.

THIRTEENTH.—The said Circuit Court also erred upon the trial and hearing of this action as aforesaid in denying the defendant's motion for an arrest of judgment in this action, on the ground that the plaintiff is not entitled to judgment in the said action upon the complaint therein as to the first cause of action upon the facts found or findings of fact made by the Referee, as stated in the said report of the said Referee made and filed in this cause on the 18th day of February, 1898, which were adopted and made the findings and decisions of the Court in this action.

FOURTEENTH.—That the said Circuit Court erred 1441
in denying the motion made by the defendant upon the trial and hearing of this action as aforesaid, for an arrest of judgment in the said action as to the first cause of action stated in the complaint, on the ground that the right of the plaintiff to recover the two sums of $9,558.63 and $40,000 mentioned in said Referee's findings and report, with interest, was and is barred by the receipt or acknowledgment and instrument executed and delivered by the plaintiff, Heman Clark, to the defendant on the 9th day of March, 1888, set out in the said Referee's report, whereby the said plaintiff acknowledged that the sum of $173,532.49 then paid to him by the defendant Railway Company, was in full satisfaction of the 1442
amount due to him on the estimates of the Chief Engineer of the defendant Railway Company and in full satisfaction of all claims of every kind, name and nature arising from or growing out of the said contract of March 6, 1886, and of the construction of the said railroad, except the obligation of the said Railway Company to account for a certain sum of $40,000 therein mentioned, which sum of $40,000, as stated in said Referee's findings and report, has been fully and duly accounted for by the defendant.

FIFTEENTH.—That the said Circuit Court also erred upon the trial and hearing of this action as aforesaid in denying the defendant's motion, made on the 1443
trial of this action, for an arrest of judgment in the said action, on the ground that the plaintiff is not entitled to judgment upon the complaint in this action as to the first cause of action stated in the complaint therein, inasmuch as the award of said judgment to the plaintiff constitutes a judgment or recovery for equitable relief in an action at law.

SIXTEENTH.—That the said Circuit Court also erred in denying the motion made by the defendant upon the trial and hearing upon this action for an arrest of judgment therein as to the first cause of

1444 action, upon the ground or for the reason that the plaintiff was not entitled to judgment under the complaint in this action for the recovery of the value of the lumber belonging to the plaintiff, alleged to have been taken and converted by the defendant to its own use in June, 1888, for the reason that the cause of action therefor is one which could not be united with the other causes of action stated in the original complaint.

SEVENTEENTH.—The said Circuit Court erred upon the hearing and trial of this action in allowing the amendment to the complaint which was allowed by the Referee on the trial of the action before him,
1445 to the effect "that on the day of
" 18 , the plaintiff was the owner of 97,000
" feet, board measure, bridge timber of the value and
" reasonably worth the sum of $2,425, which said
" timber had been brought and placed upon the line
" of the work for use in completing the said con-
" tract. That on or about the said date last
" above mentioned, the defendants, without the
" knowledge and consent of the plaintiff, wrongfully
" took possession of the said timber and converted
" the same to their own use, all to his loss and
" damage in the sum of $2,425."

EIGHTEENTH.—The said Circuit Court also erred
1446 upon the trial and the hearing of this action before the said Court in denying the motion made by the defendant, which was made upon the trial and hearing of the said action before the Referee, that the plaintiff should be required to elect as to which of the causes of action he would rely upon—whether the original causes of action stated in the original complaint or the causes of action stated in the amendments to the complaint.

NINETEENTH.—The said Circuit Court also erred upon the hearing in this action aforesaid, in finding "that the defendant failed to furnish the plaintiff

" with rights of way as by said contract it had 1447
" agreed to do, in time to enable the plaintiff to
" complete his contract prior to the first of June,
" 1887, or prior to the first of August, 1887, but on
" the contrary delayed the plaintiff in the perform-
" ance of said contract at a point upon the said road
" known as Minnaville, until October 27, 1887, by
" reason of the neglect, failure and omission of the
" defendant to obtain the necessary right of way at
" said point so as to permit the construction of the
" road and the completion of the contract at said
" point," as contained and stated in the Seventh Finding of the Referee's report, filed herein on the 18th day of February, 1898, adopted and made the finding of the Court. 1448

TWENTIETH.—The said Circuit Court and the Referee erred as aforesaid in finding and deciding that " the plaintiff was prevented from completing " his contract on or prior to August 1, 1887, and also " on or prior to June 1, 1887, by the negligence, " omission and fault of the defendant," as contained and stated in the Eighth Finding of the said report of the said Referee, adopted and made the finding of the Court upon the trial of this action.

TWENTY-FIRST.—The said Circuit Court and the Referee also erred in finding and deciding " that " there are no provisions in the contract which re- 1449
" quired that the plaintiff, and the plaintiff never
" agreed, that he should use in the construction of
" the said railroad under said contract, any patented
" nut-locks," as stated in the Eleventh Finding contained in the said Referee's report, adopted and made the finding of the Court.

TWENTY-SECOND.—The said Referee before whom this cause was tried and the said Circuit Court erred in finding " that the plaintiff was paid by the " said defendant the said sum named therein of " $213,532.49, less the sum of $40,000 claimed in said

1450 " paper to be retained for forfeiture in not com-
" pleting the performance of his work under the
" said contract on or prior to June 1, 1887," as
stated in the Thirteenth Finding of the said report
of the said Referee, adopted and made the finding
of the Court upon the hearing of this action.

TWENTY-THIRD.—The said Referee, and the said Circuit Court, and each of them, also erred in finding and deciding that "the said receipt and paper
" contained an accurate, truthful and undisputed
" account of all dealings between the said parties,
" except in the matter of the $40,000 deducted for
" time forfeiture, the $9,558 for nut-locks, embraced
1451 " in the $3,626,865.20, and the lumber therein re-
" ferred to and herein valued at $2,425," as stated in the Fourteenth Finding, contained in the said report of the said Referee, adopted and made the finding and decision of the Court upon the hearing of this action.

TWENTY-FOURTH.—The said Referee, and the said Circuit Court, and each of them erred in making the finding, decision and conclusion that "at the time
" of the signing and delivery of the said last men-
" tioned paper, the contents of the final certificate
" or estimate of the Chief Engineer of the defendant
" Railway Company under the contract were not
1452 " known to the plaintiff or his agents, other than by
" the reference thereto contained in said receipt of
" March 9, 1888," as stated in the Fifteenth Finding, contained in the report of the said Referee, adopted and made the finding of the Court upon the trial of this action.

TWENTY-FIFTH.—The said Referee, and the said Circuit Court, and each of them, also erred in finding and deciding "that no other final settlement of
" the accounts under the said contract had been had
" between the plaintiff and the defendant at the
" time said last mentioned paper was signed and

"delivered," as stated in the Sixteenth Finding, 1453
contained in the said report of said Referee, adopted and made the finding and decision of the Court upon the hearing of this action.

TWENTY-SIXTH.—The said Referee, and the said Circuit Court, and each of them, also erred in finding that "at the time of the signing and delivery of "said last mentioned paper, the question of "the liability of the plaintiff for nut-locks which "had been left by the parties to this action open "for settlement and adjustment until after "the completion of the work under said contract, "and had been referred by the defendant to the "Chief Engineer under said contract, had not been 1454
"passed upon by him; and that the said Chief En-"gineer had referred the question for opinion to the "defendant's counsel, who has not at said time "given his opinion in relation thereto," as stated in the seventeenth finding contained in said report of said Referee, adopted and made the finding and decision of the Court.

TWENTY-SEVENTH.—The said Referee and the said Circuit Court and each of them also erred in finding, upon the trial and hearing of this action, "that no "account was ever, otherwise than by said paper "and the receipt of said money, stated of the tran-"sactions under and connected with the said con- 1455
"tract between the plaintiff and the defendant," as stated in the eighteenth finding contained in the report of the said Referee adopted and made the finding of the Court upon the hearing of this action.

TWENTY-EIGHTH.—The said Referee and the said Circuit Court also erred in finding and holding "that in or about the months of March and April, "1888, the plaintiff was the owner of 97,000 feet "b. m. of bridge timber then in the yard of defend-"ant at Chillicothe, and along the line of the rail-"road. That said timber did not conform to the

1456 " standard of the defendant, and was not purchased " by the defendant from the plaintiff, or allowed " for in the final certificate of the Chief Engineer, " under the contract in this action to the plaintiff," as stated in the nineteenth and twentieth findings contained in the report of the said Referee, adopted and made the finding and decision of the Court upon the hearing of this action as aforesaid.

TWENTY-NINTH.—The said Referee and the said Circuit Court also erred in finding and deciding that " in or about the month of June, 1888, the defend- " ant took possession of the said lumber and con- " verted the same to its own use, without the consent 1457 " or knowledge of the plaintiff," and that the value of the said lumber at the time of the taking thereof in June, 1888, was $2,425, as stated in the twenty-first finding contained in the said report of the said Referee, adopted and made the finding and decision of the Court upon the hearing of this action as aforesaid.

THIRTIETH.—The said Referee and the said Circuit Court also erred in the finding, decision and conclusion of law, " that the defendant is not en- " titled to charge the plaintiff or to retain and de- " deduct from the amount earned and payable to " the plaintiff under the said contract the sum of 1458 " $40,000 as a forfeiture, or liquidated damages for " not completing the contract upon June 1, 1887," as stated by the said Referee in his first conclusion of law, adopted and made the conclusion of the Court.

THIRTY-FIRST.—The said Referee and the said Circuit Court, and each of them, also erred in holding and deciding " that under the facts proved in this " case, the plaintiff is not legally liable to the de- " fendant for any damages for failure to complete " the contract within the contract time or the time " agreed upon, for the reason that the plaintiff was

"prevented by the negligence of the defendant and
"its omission to procure the necessary right of
"way from completing the said work in such time,"
as stated in the second conclusion of law contained
in the report of the said Referee adopted and made
the finding and decision of the Court on the trial of
this action as aforesaid.

THIRTY-SECOND.—The said Referee and the said Circuit Court, and each of them, also erred in the decision and conclusion of law "that the plaintiff
"is not liable to the defendant for the sum of
"$9,558.63, the cost of patent nut locks furnished by
"the defendant to the plaintiff and still used by
"him in the performance of said contract," as
stated in the third conclusion of law contained in
the report of the said Referee, and adopted as the
finding and decision of the Court upon the trial of
this action.

THIRTY-THIRD.—The said Referee and the said Circuit Court also erred in the decision and conclusion of the Court "that there was no obligation im-
"posed by the contract upon the plaintiff to fur-
"nish and pay for patent nut locks to be used in
"the construction of said road," as contained in the
fourth conclusion of law stated in the report of the
said Referee, adopted and made the decision and
conclusion of the Court upon the hearing of this
action.

THIRTY-FOURTH.—The said Referee and the said Circuit Court, and each of them, also erred in holding and deciding "that the plaintiff is not legally in-
"debted to the defendant in any sum whatever for
"the patent nut locks furnished by the defendant and
"used in the construction of the railroad under the
"said contract," as stated in the fifth conclusion
of law contained in the report of said Referee,
adopted and made the finding and decision of the
Court upon the trial of this action.

1462 THIRTY-FIFTH.—The said Referee and the said Circuit Court, and each of them, also erred in the decision and conclusion of law "that the plaintiff "is entitled to recover from the defendant the sum "of $2,425 with interest from June 1, 1888, for the "conversion by the defendant of lumber belonging "to the plaintiff," as stated in the sixth conclusion of law contained in the report of said Referee, made and adopted as the decision and conclusion of the Court upon the trial and hearing of this action.

THIRTY-SIXTH.—The said Referee and the said Circuit Court, and each of them, also erred in hold-
1463 ing and deciding as a conclusion of law "that the "signing and delivery by the plaintiff of the re-"ceipt, on or about the 9th day of March, 1888, "and the acceptance of the check of $173,532.49, "under the facts and circumstances proved in this "case, were, as to the two sums of $9,558.63, "charged for nut locks, and $40,000, charged by "way of forfeiture for non-performance in time, "wholly without consideration and in violation of "the contract between the parties, and do not consti-"tute any bar to the recovery by the plaintiff of the "sum of $9,558.63 and $40,000, otherwise as due "under the contract," as stated in the conclusion of law numbered seven, contained in the report of
1464 said Referee, adopted and made the decision and conclusion of the Court upon the trial and hearing of this action as aforesaid.

THIRTY-SEVENTH.—The said Referee and the said Circuit Court, and each of them, also erred in holding and deciding as a conclusion of law, "that the signing "and delivery of the said receipt, and the acceptance "of the check thereunder, do not constitute a legal "payment or accord and satisfaction of the said "sums of $9,558.63 and $40,000, or either of them, "or any part of either of them," as stated in the conclusion of law numbered nine, contained in the

report of said Referee made and adopted by the 1465
Court as its decision and conclusion upon the trial of this action.

THIRTY-EIGHTH.—The said Referee, and the said Circuit Court, and each of them, also erred in holding and deciding as a conclusion of law, "that no "account of the transactions under the contract "mentioned and referred to, and of the claims sued "on in this action, was ever had or stated between "the parties to this action otherwise than by said re-"ceipt or paper of March 9, 1888," as stated in the conclusion of law numbered nine, contained in the said report of the said Referee, adopted as the decision and conclusion of the Court. 1466

THIRTY-NINTH.—The said Referee, and the said Circuit Court, and each of them, also erred in holding and deciding "that the plaintiff is entitled to "recover the amount certified by the Chief Engi-"neer of $3,895,793.79 without the deduction claimed "by the defendant for nut locks of $9,558.63, and "without allowance to the defendant by way of "forfeiture, for non-completion of the railway on "the first day of June, 1887; and is also entitled to "recover for timber used by the defendant on the "30th day of June, 1888, to the amount of $2,425, "with interest from June 30, 1888, the whole "amounting to the day of the report of said Referee, 1467
"namely, the 4th day of December, 1897, to the "sum of $81,305.88, for which, with interest from "said date and disbursements, the plaintiff was en-"titled to judgment, less the amount paid by the "defendant, in excess of the reserved $40,000," as stated in the conclusion of law numbered ten, contained in the report of the said Referee, adopted and made the finding, decision and conclusion of the Court upon the trial of this action.

FORTIETH.—The said Referee, and the said Circuit Court, and each of them, also erred in holding and

1468 deciding that there should be a judgment for the plaintiff for the sum of $80,479.35, with interest and costs, as stated in the report of the said Referee, made and adopted as the decision and conclusion of the Court upon the hearing of said action.

FORTY-FIRST.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to find and decide, as requested by the defendant, that the check of the defendant Railway Company for $173,532.49 was delivered, and the said sum of $173,532.49 was paid by the said defendant Railway Company to the said Heman Clark in full satisfaction of the amount due to said Clark on the estimates of
1469 the Chief Engineer of the Railway Company, and in full satisfaction of all claims and demands of every kind, name and nature, arising from or growing out of the said contract of March 6, 1886, and of the construction of said railway, excepting the obligation of the said Railway Company to account for the sum of $40,000 mentioned as reserved to meet claims, as stated in the said acknowledgment and not otherwise.

FORTY-SECOND.—The said Referee and the said Circuit Court, and each of them, also erred in refusing to find and decide as requested by the defendant, that the defendant Railway Company has duly
1470 paid, for or on account of the said Heman Clark, in money, materials, labors, transportation and other charges for which the said Heman Clark was liable, the whole amount earned by and due to him for all work performed and materials furnished by him under the said contract made between the said Railway Company and the said Heman Clark, dated March 6, 1886, for the construction of the said railroad, including all extra work performed and material furnished by him of every kind and description, in the construction of the said railroad agreed to be built by him.

FORTY-THIRD.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to find and decide as requested by the defendant upon the trial and hearing of this action as aforesaid, that in and by the receipt, declaration and acknowledgment signed and executed by the plaintiff Heman Clark, on the 9th day of March, 1888, mentioned and set out in the findings of fact made by the said Referee and by the statement therein contained, an account was duly stated and agreed to by and between the plaintiff Heman Clark and the defendant Railway Company, concerning the amount and value of the work done and materials furnished by the plaintiff under the contract between said Clark and the said Railway Company, dated March 6, 1886, for the construction of the railroad thereby agreed to be built, including all extra work performed and material furnished of every kind and description, and that there was then payable on the said contract to the said Clark by the said Railway Company the sum of $173,532.49.

FORTY-FOURTH.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to find and decide, as requested by the defendant upon the trial and hearing of this action as aforesaid, that in and by the payment of the said sum of $173,532.49, made by the said defendant Railway Company to the said Clark, on the said 9th day of March, 1888, upon the execution and delivery by him to said Railway Company of the receipt, declaration and acknowledgment before mentioned, whereby the plaintiff Clark acknowledged that he had received from the defendant Railway Company the said sum of $173,532.49 in full satisfaction of the amount due to him on the estimates of the Chief Engineer and in full satisfaction of all claims and demands of every kind, name and nature, arising from or growing out of the said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of the Railway Company to

1474 account for the sum of $40,000 reserved to meet certain claims mentioned in the said acknowledgment, there was an accord and satisfaction between the said Clark and the defendant Railway Company as to the amount due by said Railway Company upon the estimates of the Chief Engineer as to the amount and value of all work done and material furnished by said Clark under the said contract, including all extra work performed and material furnished, of every kind and description, and the payment by said Railway Company to said Clark of said sum of $173,532.49 in full satisfaction of the amount due to said Clark from said Railway Company upon said contract, and for all claims and demands of
1475 every kind, name and nature in favor of said Clark against said Railway Company, arising from or growing out of said contract and of the construction of said railway, excepting the obligation of the said Railway Company to account for the sum of $40,000 reserved as aforesaid.

FORTY-FIFTH.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to find and decide as a conclusion of law, as requested by the defendant upon the trial and hearing of this action, that the plaintiff is not entitled to recover from the defendant the sum of $2,425, or any other sum, for or on account of any timber belonging to the plaintiff, alleged to have been converted by the
1476 defendant Railway Comaany to its own use in the month of June, 1888, or at any other time.

FORTY-SIXTH.—The said Referee and the said Circuit Court, and each of them, also erred in refusing to find and decide, as requested by the defendant, upon the trial and hearing of this action, that the defendant Railway Company is entitled to recover from the plaintiff, Heman Clark, the sum of $521.75, together with the costs of this action.

FORTY-SEVENTH..—The said Referee and the said Circuit Court, and each of them, also erred in its re-

fusal to find as requested by the defendant in its First, Second and Third Requests to find, submitted to the Referee, as contained in and made part of said Referee's report, filed herein on the 18th day of February, 1898. 1477

FORTY-EIGHTH.—The said Referee and the said Circuit Court, and each of them, also erred in refusing to find, as requested by the defendant upon the trial and hearing of this action before the said Referee and the Court. in accordance with its Ninth Request to Find, contained and stated in the Requests to find annexed to the report of the Referee filed herein on the 18th day of February, 1898.

1478

FORTY-NINTH.—The said Referee and the said Circuit Court, and each of them, also erred in refusing to find, as requested by the defendant, as contained in the Fourteenth and Fifteenth Requests to Find, annexed to and made part of the said report of the said Referee, and adopted as the action of the Court herein upon the trial of this action.

FIFTIETH.—The said Referee and the said Circuit Court and each of them, also erred in refusing to find and decide as requested by the defendant, as contained and stated in the Seventeenth and Eighteenth Requests to Find, made and asked to for by the defendant, as contained in the said requests, annexed to the said report of said Referee as aforesaid. 1479

FIFTY-FIRST.—The said Referee and the said Circuit Court, and each of them, also erred in refusing to find and decide as requested by the defendant, as stated in the Twenty-sixth Request to Find, annexed to and made part of the said last mentioned report of the said Referee.

FIFTY-SECOND.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to find and decide as requested by the defendant

upon the trial and hearing of this action, as contained in the Twenty-seventh Request made and submitted by the defendant, as stated and contained in the requests to find annexed to the report of the said Referee, filed herein on the 18th day of February, 1898.

FIFTY-THIRD.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to find and decide as requested by the defendant, as stated and contained in the Twenty-eighth Request to Find made by the defendant, annexed to the report of the said Referee as aforesaid.

FIFTY-FOURTH.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to find and decide as requested by the defendant, as contained in the Twenty-ninth Request to Find, made and submitted by the defendant to the said Referee, as contained in said report.

FIFTY-FIFTH.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to find and decide as requested by the defendant, as contained in the Thirtieth Request to Find, made and submitted by the said defendant to the said Referee and to the Court, as contained in the said report of the said Referee.

FIFTY-SIXTH.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to find and decide, as requested by the defendant, as stated and contained in the Thirty-second Request to find, annexed to the report of the said Referee, filed as aforesaid, to the effect "such nut-locks are "a necessary part of the track material required for "the construction and finishing in the most sub- "stantial and workmanlike manner of the work "necessary to be done in the construction and com- "pletion of a line of railroad."

FIFTY-SEVENTH.—The said Referee, and the said 1483
Circuit Court, and each of them, also erred in refusing to find and decide, as requested by the defendant, "that said nut locks are necessary to be used "to place and well bolt the splices upon the rails "agreed to be laid, and to do the work of laying "said tracks in the most approved manner."

FIFTY-EIGHTH.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to find and decide, as requested by the defendant, that "in the construction of the lines of "the defendant's railroad then in existence, nut-"locks had been used to a large extent, and they "were a standard of the said Chicago, Milwaukee 1484
"and St. Paul Railway, and were then in general "use upon other lines of railroad throughout the "United States."

FIFTY-NINTH.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to find and decide, as requested by the defendant, that "the defendant Railway Company did not fail "to procure the necessary right of way for the "construction of the railroad agreed to be built by "the plaintiff under the said contract of March 6, "1886, at or near Minnaville, Missouri, at the cross-"ing of the Hannibal and St. Joseph Railway, in "such time as not to delay the plaintiff in the com-1485
"pletion of the work or construction of the said "railroad at the said crossing."

SIXTIETH.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to find and decide, as requested by the defendant, that "the right of way for the line of railroad of the "defendant Railway Company at Minnaville was "procured by the defendant Railway in July, 1886, "and the point and place and method of crossing "of the railroad of the defendant Railway Com-"pany with the railroad of the Hannibal and St.

1486 " Joseph Railroad at said place was arranged for
" and completed by and at the time that the plain-
" tiff was ready to lay the track at that place upon
" the line of the defendant's railroad, agreed to be
" built under and by the said contract of March 6,
" 1886."

SIXTY-FIRST.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to find and decide, as requested by the defendant, that "the defendant Railway Company did not, in
" the month of June, 1888, or at any other time,
" without the knowledge or consent of the plaintiff,
" wrongfully or otherwise take possession of any
1487 " timber belonging to the plaintiff, or convert the
" same to its own use for the purpose of repairing
" a washout or otherwise."

SIXTY SECOND.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to decide as a conclusion of law, as requested by the defendant, that "the receipt, declaration and
" acknowledgment signed and executed by the
" plaintiff Clark on the 9th day of March, 1888,
" mentioned and set out in the findings of fact made
" by the said Referee, and the statement therein
" contained and recited of the amount earned by
" and paid to said Clark by the defendant Rail-
1488 " way Company, was and is an account stated and
" agreed to by and between the said plaintiff Clark
" and the defendant Railway Company concerning
" the amount and value of the work done and ma-
" terial furnished by said plaintiff under the said
" contract made between the said Heman Clark and
" the said defendant Railway Company, dated
" March 6, 1886, for the construction of the railroad
" thereby agreed to be built by the plaintiff, includ-
" ing all extra work performed and materials fur-
" nished by him of every kind and description, and
" the credits to which the plaintiff was entitled for
" materials sold by him to said Railway Com-

" pany, and rebates and other matters of that de 1489
" scription; and of the amount which the said Rail-
" way Company had paid to the said Heman Clark
" to apply on the said contract, in money, material,
" labor and transportion, and of the amount with
" which he was chargeable for transportation under
" the said contract, and the amount with which he
" was also chargeable by reason of the supplemen-
" tal contract or agreement, for not completing the
" said railroad by the first day of June, 1887,
" whereby it was stated and agreed that the amount
" due to the said Heman Clark on the said contract
" was the sum of $213,532.49, and whereby it was
" further agreed that $40,000 of the amount so due
" under said contract should be reserved and set 1490
" aside by said Railway Company as indemnity or
" security for the payment of claims mentioned in
" the said instrument, against which the said Clark
" had agreed to save the said Railway Company
" free and harmless; and that there was then pay-
" able on said contract to said Clark by said Railway
" Company, the sum of $173,532.49."

SIXTY-THIRD.—The said Referee and the said Circuit Court, and each of them, also erred in refusing to hold and decide as a conclusion of law, as requested by the defendant, that "in and by the pay-
" ment of the said sum of $173,532.49 paid by said
" defendant Railway Company to said Heman Clark 1491
" on the said 9th day of March, 1888, upon the ex-
" ecution and delivery by him to the said Railway
" Company of the said receipt, declaration and
" acknowledgement hereinbefore mentioned, there
" was an accord and satisfaction between the said
" plaintiff and the said defendant Railway Company
" of the amount due by said Railway Company to
" the plaintiff upon the estimates of the Chief Engi-
" neer of said Railway Company of the amount and
" value of all work done and material furnished by
" said Clark under said contract between said Clark
" and said Railway Company for the construction

1492 " of said Railroad agreed to be built by the plaintiff
" as aforesaid, including all extra work performed
" and material furnished, of every kind and descrip-
" tion, and the payment by said Railway Company
" of said sum of $173,532.49, in full satisfaction of
" the amount due to him from said Railway Com-
" pany as aforesaid, excepting the obligation of said
" Railway Company to account for the sum of
" $40,000 reserved by said Railway Company as an
" indemnity against claims which might be made
" against said Company for liens of workmen and
" claims of sub contractors, and all other claims for
" damages, as specified in the said receipt or ac-
" knowledgment."

1493

SIXTY-FOURTH.—The said Referee and the said Circuit Court, and each of them, also erred in refusing to decide, as a conclusion of law, as requested by the defendant, that " the plaintiff is not entitled " to recover of or from the defendant the sum of " $2,425, or any other sum, for or on account of any " timber belonging to the plaintiff, alleged to have " been converted by said defendant to its own use " in the month of June, 1888, or at any other time."

SIXTY-FIFTH.—The said Referee and the said Circuit Court, and each of them, also erred in refusing to hold and decide, as a conclusion of law, as re-
1494 quested by the defendant, that " in and by the said " receipt and acknowledgment signed and executed " by the said Heman Clark on the 9th day of March, " 1888, said plaintiff Clark agreed to accept the said " sum of $173,532.49 therein mentioned and then " paid to him by the defendant Railway Company, " in full satisfaction of the amount due to him by " the said Railway Company on the estimates of the " Chief Engineer of the Railway Company, and in " full satisfaction of all claims and demands of said " Clark against said Railway Company, of every " kind, name and nature, arising from or growing " out of the said contract of March 6, 1886, and of

"the construction of the said Railroad thereby
"agreed to be built, excepting the obligation of said
"Railway Company to account for the sum of
"$40,000 reserved to meet claims as provided in and
"by said instrument."

SIXTY-SIXTH.—The said Referee and the said Circuit Court, and each of them, also erred in refusing to hold and decide, as a conclusion of law, as requested by the defendant, that "the said sum of "$173,532.49 then paid by said Railway Company "to said plaintiff Clark, and received and collected "by him, was a good and valuable consideration for "the execution and delivery of said instrument by "him and for the said agreement by said Clark."

SIXTY-SEVENTH.—The said Referee and the Circuit Court, and each of them, also erred in refusing to hold and decide as a conclusion of law, as requested by the defendant, that "in and by the said receipt "and acknowledgment signed by said plaintiff, the "said Clark, so far as he could legally bind himself "for the consideration therein recited in said paper, "accepted the said sum of $173,532.49 as in full as "therein stated, except as to the sum of $40,000 re-"served to meet his guaranty recited in said receipt, "and so far as his agreement and signature could "give it force, agreed and accepted these amounts "as establishing that he had no claim for nut-locks, "and had credited the Railway Company with "$40,000, because of the non-completion of the rail-"road by the first of June, 1887."

SIXTY-EIGHTH.—The said Referee and the said Circuit Court, and each of them, also erred in refusing to hold and decide as a conclusion of law, as requested by the defendant, that "it is of no value or import-"ance in this consideration that the plaintiff Clark "claims to have signed the said receipt improvi-"dently and without due consideration. He is bound "by it so far as he could legally bind himself from

1498 " retraction, quite as much as if he had taken days
" for its consideration, been advised by counsel, and
" was under no pecuniary stress pressing him to ac-
" cept a smaller sum than was due."

SIXTY-NINTH.—The said Referee and the said Circuit Court, and each of them, also erred in refusing to hold and decide as a conclusion of law, as requested by the defendant, that "the agreement
" made by said plaintiff Clark with said Railway
" Company, to forfeit the sum of $40,000 if said rail-
" road agreed to be built was not completed by the
" first day of June, 1887, was supported by a valu-
" able consideration, and was intended to be and
1499 " was in its essential nature liquidated damages."

SEVENTIETH.—The said Referee and the said Circuit Court, and each of them, also erred in refusing to hold and decide, as requested by the defendants,
" that the said receipt and acknowledgment of
" March 9, 1888, executed by said Heman Clark in
" consideration of the said sum of $173,532.49 then
" paid to him by the defendant Railway Company,
" and the acceptance by said Clark of the payment
" of said sum to him by said Railway Company,
" and its retention by him, was and is a bar to the
" recovery by the plaintiff in this action of the
" amount charged to the plaintiff by the Railway
1500 " Company for nut-locks, and the amount of said
" forfeiture for not finishing the said railroad agreed
" to be built by the first day of June, 1887."

SEVENTY-FIRST.—The said Referee and the said Circuit Court, and each of them, also erred in refusing to hold and decide, as requested by the defendant, that " the plaintiff cannot maintain this action upon
" the complaint or the amended complaint therein
" for the recovery by him from the defendant of the
" amount allowed to him for nut-locks used by him
" in the construction of the railroad agreed to be
" built by him as provided by said contract of

" March 6, 1886, between the plaintiff and the de- 1501
" fendant Railway Company, or for the recovery of
" the amount of the forfeiture of $40,000 agreed to
" by said plaintiff if the said railroad so agreed to
" be built was not completed by the first day of June,
" 1887."

SEVENTY-SECOND.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to decide and hold, as requested by the defendant, that the " plaintiff is not entitled to recover
" from the defendant Railway Company the
" amount charged to him for nut-locks used in the
" construction of said railroad agreed to be built by
" him, as provided by the said contract of March 6, 1502
" 1886."

SEVENTY-THIRD.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to hold and decide, as requested by the defendant, that "the plaintiff is not entitled to re-
" cover from the defendant Railway Company in
" this action the amount of said forfeiture of $40,000
" for not completing the said road so agreed to be
" built, by the first day of June, 1887."

SEVENTY-FOURTH.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to find and decide, as requested by the de- 1503
fendant, that " there is no proof that the defendant
" Railway Company wrongfully took possession of
" or converted to its own use any timber belonging
" to the plaintiff, without his knowledge or consent,
" in the month of June, 1888, or at any other time."

SEVENTY FIFTH.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to hold and decide, as a matter of law, as requested by the defendant, that " the plaintiff is not
" entitled to and cannot maintain this action for
" the recovery of the value of any timber alleged to

1504 " have been taken by the defendant Railway Com-
" pany and converted to its own use without the
" knowledge or consent of the plaintiff," and also
" that the plaintiff is not entitled to recover from
" the defendant the said sum of $2,425, or any other
" sum, for the value of any timber alleged to have
" been taken and converted by the defendant to its
" own use in the month of June, 1888, or at any
" other time."

SEVENTY-SIXTH.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to hold and decide, as a matter of law, as requested by the defendant, that " the plaintiff is not
1505 " entitled to recover from the defendant any sum
" whatever for, upon or by reason of any of the
" matters or things alleged in the complaint in this
" action, or in the amendments to the complaint, or
" the amended complaint."

SEVENTY-SEVENTH.—The said Referee, and the said Circuit Court, and each of them, also erred in refusing to hold and decide, as requested by the defendant, that " the defendant Railway Company is
" entitled to recover of and from the plaintiff the
" sum of $521.75, with interest thereon, amounting
" in all to $826.53, and is entitled to judgment there-
" for against the plaintiff, together with the costs
1506 " and disbursements of this action."

Wherefore, the said Chicago, Milwaukee and St. Paul Railway Company prays that a writ of error may be issued to the said Circuit Court of the United States for the Southern District of New York, for the review by the United States Circuit Court of Appeals for the Second Circuit, of the said record and proceedings in said action hereinbefore mentioned, in which the said Heman Clark was plaintiff and said Chicago, Milwaukee and St. Paul Railway Company was defendant, and that, for the errors aforesaid, the judgment entered in and at a

Term of the Circuit Court of the United States for the Southern District of New York, on the sixth day of April, 1898, in the said above entitled action, in favor of said Heman Clark against said Chicago, Milwaukee and St. Paul Railway Company for the sum of $88,084.86 may be reversed, and that the said record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein, to correct those errors, which of right and according to law and custom of the United States ought to be done, and that said Chicago, Milwaukee and St. Paul Railway Company may have such judgment and relief as it may be lawfully entitled to.

And said petitioner will ever pray, &c.

CHICAGO. MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
BY BANGS, STETSON, TRACY & MACVEAGH,
its Attorneys, &c.,
15 Broad Street, Borough of Manhattan,
New York City.

C. W. BANGS,
Counsel.

(Endorsed)—United States Circuit Court, Southern District of New York.—Heman Clark *vs.* Chicago, Milwaukee & St. Paul Railway Company. —Defendant's assignment of errors and petition for writ of error and reversal.—Bangs, Stetson, Tracy & MacVeagh, Attorneys for Defendant, 15 Broad Street, New York.—U. S. Circuit Court.—Filed Apr. 21, 1898.—John A. Shields, Clerk.

1510 CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

In the Second Circuit.

HEMAN CLARK

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Supersedeas Bond for Damages and Costs.

1511

KNOW ALL MEN BY THESE PRESENTS that the Chicago, Milwaukee and St. Paul Railway Company, as principal, and the American Surety Company, as surety, are held and firmly bound unto the above named Heman Clark in the sum of one hundred thousand dollars, to be paid to the said Heman Clark, his executors, administrators or assigns, for which payment well and truly to be made the said Chicago, Milwaukee and St. Paul Railway Company and the said American Surety Company jointly and severally bind themselves firmly by these presents.

Sealed with the corporate seal of said Chicago,
1512 Milwaukee and St. Paul Railway Company and said American Surety Company this 14th day of April, 1898.

Whereas the above named Chicago, Milwaukee and St. Paul Railway Company is about to sue out a writ of error from the United States Circuit Court of Appeals for the Second Circuit to the Circuit Court of the United States for the Southern District of New York to reverse a judgment entered in the said Circuit Court of the United States for the Southern District of New York on the sixth day of April, 1898, in favor of said Heman Clark above named against said Chicago, Milwaukee and St.

Paul Railway Company for the sum of eighty-eight 1513
thousand and eighty-four $\frac{86}{100}$ dollars ($88,084.86).

Now, therefore, the condition of this obligation is such that if the said above named Chicago, Milwaukee and St. Paul Railway Company shall prosecute its said writ of error to effect and answer all damages and costs, if it shall fail to make its plea good, then this obligation shall be void, otherwise to remain in full force and virtue.

Sealed and delivered and taken and acknowledged this 14th day of April, 1898, before me.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
By FRANK S. BOND, 1514
[SEAL.] Vice-Prest.

Attest:
JAMES M. M'KINLAY,
Assistant Secretary.

AMERICAN SURETY COMPANY OF NEW YORK,
By DAVID B. SICKELS,
[SEAL.] Vice-President.
CORTLANDT S. VAN RENSSELAER,
Attorney.

STATE OF NEW YORK, } ss.:
County of New York, }

1515

On this 15th day of April, one thousand eight hundred and ninety eight, before me personally came Frank S. Bond, with whom I am personally acquainted, who being by me duly sworn, said that he resided in the County of New York; that at the time of the execution of the foregoing instrument he was the vice-president of the Chicago, Milwaukee and St. Paul Railway Company; that he knew the corporate seal of said Chicago, Milwaukee and St. Paul Railway Company, and that the seal affixed to the foregoing instrument was such corporate seal; that it was affixed by order of the Board of Directors

of said Company, and that he signed his name thereto by like order as vice-president of said Company.

ROBERT HALL,
Notary Public,
Kings Co.
Cert. filed in N. Y. Co.

[SEAL.]

State and County of New York, ss.:

On this 15th day of April, 1898, before me personally appeared David B. Sickles, vice-president of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say that he resided in the City of New York; that he is the vice-president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickles further said that he was acquainted with Cortlandt S. Van Rensselaer, and knew him to be one of the attorneys of said corporation; that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer, and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him, the said David B. Sickles, vice-president.

WM. E. MINER,
Notary Public (No. 78),
New York Co.
Cert's. filed in Kings, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk and Rockland Co's.

[SEAL.]

At a regular quarterly meeting of the Board of Trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

Resolved, That the president and vice-presidents be, and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

County of New York, ss.:

I, CORTLANDT S. VAN RENSSELAER, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company, at the City of New York, this 15th day of April, 1898.

CORTLANDT S. VAN RENNSELAER,
Attorney.

[SEAL.]

40,583.

(Endorsed)—Circuit Court of United States, Southern Dist. of New York, in the Second Circuit.—Heman Clark *vs.* Chicago, Milwaukee and St. Paul Railway Co.—Supersedeas bond for damages and costs.—The within bond is approved as to sufficiency and form.—E. Henry Lacombe, U. S. Circuit Judge.—U. S. Circuit Court.—Filed Apr. 21, 1898.—John A. Shields, Clerk.

1522 By the Honorable E. HENRY LACOMBE, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit:

To HEMAN CLARK, of the City of New York, GREETING:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 19th day of May, 1898, pursuant to a writ of error, filed
1523 in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein the Chicago, Milwaukee & St. Paul Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 21st day of April, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of these United States the one hundred and twenty-second.

1524 E. HENRY LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

WILLIAM L. MILLIGAN, being duly sworn, deposes and says: That on the 23d day of April, 1898, he served the within citation upon Heman Clark therein named, by delivering to the said Heman Clark in

person, at Port Chester, in the County of Westchester, in the Southern District of New York, a copy of the said citation, at the same time showing to him the within original citation. 1525

Deponent further says that he knew the said Heman Clark to be the same person described in and to whom the said citation was addressed.

WM. L. MILLIGAN.

Sworn to before me this 25th day of April, 1898.

PATRICK A. NOLAN,
[SEAL.] Notary Public,
Kings County.
Certificate filed in N. Y. Co.

1526

(Endorsed)—United States Circuit Court of Appeals for the Second Circuit.—The Chicago, Milwaukee and St. Paul Railway Company, Plaintiff in Error, *vs.* Heman Clark, Defendant in Error.—Original Citation.—Due service of a copy of the within is hereby admitted.—Dated day of , 189 .—A copy of the within paper has been this day received at the office of Kellogg, Rose & Smith, Apr. 21, 1898.—Kellogg, Rose & Smith, 120 Broadway, N.Y.—U. S. Circuit Court.—Filed Apr. 25, 1898.—John A. Shields, Clerk.

1527

1528 UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Plaintiff in Error,

vs.

HEMAN CLARK,
1529 Defendant in Error.

It is hereby consented that in printing the "Transcript of Record" from the Circuit Court of the United States for the Southern District of New York, returned and filed with the Clerk of this Court, upon the writ of error in this action, the Clerk need not print the copy of the paper entitled "Contract for the Construction of Kansas City Line, Chicago, Milwaukee and St. Paul Railway Company, with Heman Clark, March 6, 1896," attached to the defendant's amended answer to the original
1530 complaint (pp. 36–75 of the original transcript of record, p. 20 of record as printed); and that the Clerk shall add and print at the end of said answer the following note, namely:

> "The copy of the contract mentioned and referred to in the within answer, and attached thereto, is the same as the copy attached to the fourth finding of fact made or given by George Hoadly, Esq., the Referee in this action, upon the defendant's (plaintiff in error's) request, as contained in the report of said Referee, filed February 18, 1898 (pp. 220–259 of original transcript of record, pp. 147 of same as printed)."

It is further consented that the paper contained in 1531
the said Transcript of Record filed February 24, 1898, forming part of the judgment roll (pp. 292-325 of the original transcript of record, p. 230, as printed), entitled "Defendant's Exceptions to the Report, Findings, Decision and Conclusion of Hon. George Hoadly, Referee in this action," need not be printed by the Clerk; the same being repeated in the bill of exceptions taken before the Referee, at pages 619-657 of the original transcript of record; and in place thereof the Clerk shall print the following note, namely:

"The exceptions filed by the defendant to the report, findings, decision and conclusion of law of the Hon. George Hoadly, the Referee in this 1532
action, filed February 18, 1898, and which exceptions were filed with the Clerk of the Circuit Court of the United States for the Southern District of New York, on the 24th day of February, 1898, and are included as part of the judgment roll, are set out in the bill of exceptions, at pp. 619-657 of the original transcript of record (p. 447 of the same as printed)."

KELLOGG, ROSE & SMITH,
Attys. for Plff.-Deft. in Error.

BANGS, STETSON, TRACY & MACVEAGH,
Attys. for Plff. in Error.

1533

(Endorsed)—United States Circuit Court of Appeals, Second Circuit.—Chicago, Milwaukee & St. Paul Railway Company, Plaintiff in Error, *vs.* Heman Clark, Defendant in Error.—Stipulation in Regard to Printing of Record.—Bangs, Stetson, Tracy & MacVeagh, Attorneys for Plaintiff in Error, 15 Broad Street, New York City.—United States Circuit Court of Appeals, Second Circuit.—Filed June 1, 1898.—William Parkin, Clerk.

Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 51.—October Term, 1898.

Submitted January 24, 1899. Decided March 15, 1899.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Plaintiff in Error, *vs.* HEMAN CLARK, Defendant in Error.	In Error to the Circuit Court of the United States for the Southern District of New York. Before Judges WALLACE and LACOMBE.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, entered April 6, 1898, in favor of defendant in error, who was plaintiff below, for $83,084.86 against the Chicago, Milwaukee & St. Paul Railway Company, defendant below. The judgment was entered upon the report of Hon. George Hoadley as referee. The complaint set forth six separate causes of action. The referee found in favor of the plaintiff, as to part of the claim declared upon in the first, and as to the fifth cause of action; he found in favor of the defendants as to all the remaining causes of action. Inasmuch as the plaintiff has not sued out writ of error it will be unnecessary to discuss and causes of action other than the first and fifth. The facts sufficiently appear in the opinion.

LACOMBE, *Circuit Judge.*—In March 1886 a written contract was entered into between the parties whereby Clark agreed to construct a line of railroad from Ottumwa, Iowa, to Harlem Station (afterwards changed to Randolph's

the full text of the contract in his findings, it may be looked at to see whether it contains any such provisions. The only provisions which it is contended support this contention are these :

Article I, Section 1. [Clark agrees] " to furnish all the material for, and also to execute, construct and finish in every respect in the most substantial and workmanlike manner, all the work hereinafter specified &c." As to this it is sufficient to say that the question whether nut locks are essential to a substantial and workmanlike construction, is a question of fact and the referee has not found an affirmative answer to such question, but has expressly refused so to find.

Article I, Section 3 : " Materials and workmanship required by said first party to be furnished or performed for, in or about the work *hereinbefore mentioned, and hereinafter particularly specified and set forth*, shall be furnished and performed in strict accordance with the rules, regulations and specifications therefor now made or hereafter to be made by said Chief Engineer, and in all respects, to his satisfaction and acceptance." The nut-locks are nowhere mentioned in the contract nor particularly specified and set forth therein, unless they are to be included in the phrase " most substantial and workmanlike manner " already referred to, or in one or other of the phrases " splices and bolts of the J. T. Clark pattern " and " place and well bolt the splices in the most approved manner "—which are next to be considered.

Article VI, Section 1. [Clark further agrees] " to furnish and lay in place all the track material required * * * including steel rails of sixty pounds per yard ; splices and bolts of the J. T. Clark pattern, and spikes and ties, and all said material shall be of the said first party's standard and size." Article VI, Section 4. " To place and well bolt the splices thereof, and do all work of laying said tracks in the most approved manner."

Whether a nut-lock is an essential or even a usual or frequent component of the " J. T. Clark pattern " of splice

and bolt; whether it is included within defendant's "standard" of track-laying; whether the "most approved manner" of track-laying makes use of nut-locks are all questions of fact, and there is no finding of an affirmative answer to any one of them.

There is nothing in the record therefore to sustain the contention of plaintiff in error as to the nut-locks being required by the provisions of the contract. The briefs contain references to the testimony but no alleged errors in the findings of fact are before the appellate court for for review or correction. The practice in cases heard by referee is laid down by the Supreme Court as follows:

"As the Court in its judgment ordered his findings to stand as the findings of the Court, the only questions before this Court are whether the facts found by the referee sustain the judgment. As the case was not tried by the Circuit Court upon a waiver in writing of a trial by jury this Court cannot review exceptions to the admission or exclusion of evidence, or to findings of fact by the referee, or to his refusal to find facts as requested." *Shipman* v. *Straitsville Mining Co.* (158 *U. S.* 361).

There is no error, therefore, in the conclusion of the referee that the defendant was not entitled to charge the cost of the nut-locks against the plaintiff as a payment on account.

As to overtime penalty. The defendant insisted that by reason of some delay of the contractor in completing the work, it became entitled to offset against whatever he had earned under the contract the sum of $40,000. The findings of the referee on this branch of the case are as follows:

"6. That the plaintiff made and entered into a supplemental contract whereby he agreed with the defendant to complete his performance of said contract on or before June 1, 1887, and to allow the said defendant, by way of forfeiture, in case the said railway were not so completed by the 1st of June, 1887, the sum of $40,000.

"7. That the defendant failed to furnish the plaintiff with rights of way as by said contract it had agreed to do in time to enable the plaintiff to complete his contract prior to the 1st of June, 1887, or prior to the 1st of August, 1887, but on the contrary, delayed the plaintiff in the performance of said contract at a point upon the said road known as Minneville until October 27, 1887, by reason of the neglect, failure and omission of the defendant to obtain the necessary right of way at said point so as to permit the construction of the road and completion of the contract at said point.

"8. That the plaintiff was thereby prevented from completing his contract on or prior to August 1, 1887, and also on or prior to June 1, 1887, by the negligence, omission and fault of the defendant."

Upon these findings there seems to be nothing left to be said. Indeed the argument of plaintiff in error is really to the effect that the findings of fact are incorrect; that rights of way were acquired at Minneville earlier than Oct. 27, 1887, or that delay as to securing rights of way did not prevent plaintiff from completing his contract. But, under the authority above cited these are matters which the Appellate Court will not consider. There is no error, therefore, in the referee's conclusion that the defendant was not entitled to charge this item of $40,000 against plaintiff as a payment on account. It is not understood, however, that the referee has held, nor is it intended in this opinion to hold that there was any bad faith on the part of the Company in advancing these claims for the nut-locks and overtime penalty, both items were legitimate matters of dispute, and unless settled by agreement of the parties might fairly be brought by either party into Court.

Out of the moneys earned under the contract for specified and for extra work the defendant has retained these two sums of $9,558.63 and $40,000; that extent ($49,558.63) it has not paid the amount earned, certified by the engineer and included in the final estimate, and for those items the referee has reported and the Court has adjudged in favor of the plaintff. Error is assigned in that the referee

found facts showing, as is contended, an accord and satisfaction which operated to release all claims for these items, but nevertheless found as a conclusion of law that no such defense was established. This is the real question in the case and indeed the only question presented upon this review.

It will be remembered that when the work had been completed it appeared by the certificate of the Chief Engineer, and by the final estimate that plaintiff had earned $3,895,798.79; the certificate, taken in connection with the contract, liquidated his earnings at that amount, and the railroad was in no position to litigate in good faith as to the amount of those earnings. As is usual, however, in works of this character plaintiff had been paid certain sums in cash upon monthly estimates, and there were also charged against him as payments various sums expended by the Company for materials and various charges for labor and transportation furnished by it; these various credits to the Company aggregated $3,626,865.20, and, except as to the nut-locks, there was not and apparently never had been any controversy between the parties touching this amount.

In this condition of affairs and on March 9, 1888, the plaintiff signed and delivered to a representative of defendant a paper writing or receipt presented to him by the defendant for signature (a copy will be found *infra*) and on the same day received from the defendant a check for the sum of $173,532.49, which he retained and cashed. There is nothing in the findings to show that plaintiff signed this receipt improvidently or without due consideration, nor that it fails in any way to set forth accurately the agreement entered into between the parties on that day, nor that the plaintiff was under any pecuniary stress pressing him to accept a smaller sum than was due.

The receipt reads as follows:

"Whereas, a final estimate has been made by D. J. Whittemore, Chief Engineer of the Chicago, Milwaukee and St. Paul Railway Company, of all the work done and material furnished under the contract made between said

Railway Company and Heman Clark, bearing date March 8, 1886, for the construction of the railroad from Ottumwa, in Iowa, to the Missouri River, including all extra work performed and material furnished of every kind and description, which estimate, with the prior monthly estimates, less deductions made for work not done and work assumed by said company, amounts to $3,895,798.79;

And whereas, the further sum of $34,598.90 should be credited to said Clark for materials sold by him to said company, and certain rebates and other matters of that description, making, with the amount of said estimates, the sum of $3,930,397.69;

And whereas, the said Chicago, Milwaukee and St. Paul Railway Company has paid the said Clark to apply on said contract, in money, material, labor and transportation, the sum of $3,626,865.20;

And whereas, by the terms of Section 4, Article 13, of said contract, said Clark was to be charged in addition for transportation the sum of $50,000;

And by a supplemental contract was to allow the said Railway Company, by way of forfeiture in case said railway was not completed by the first day of June, 1887, the further sum of $40,000;

Making the amount paid on said contract, together with the allowance of said transportation and the allowance of said forfeiture, the sum of $3,716,865.20.

Leaving the amount still due said Clark on said contract the sum of $213,532.49.

And whereas, in and by said contract it was provided that the said Heman Clark, party of the first part, should save the said Railway Company free and harmless from all claims that might be made against said Railway Company for liens of workmen and claims of sub-contractors, and from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle, and from all damages for cattle or other domestic animals killed or injured and from all damages suffered by said sub-contractors and employés while engaged upon said work of which said class of claims, about $40,000 in amount, have been made

upon and are now pending in courts by divers claimants against said Railway Company, and the sum of $40,000 of the amount so due as aforesaid, under said contract to the said Heman Clark, has been reserved and set aside by said Railway Company, as indemnity or security for the payment of said claims and of such other claims of the same class as hereafter be made, in case said claimants, or any of them, recover judgments against said Railway Company, and the said $40,000, or the balance thereof, after paying and settling such claims as may be established against said Railway Company, is to be paid over to the said Heman Clark as soon as said claims are satisfied or said Railway Company suitably indemnified from any loss on account of the same, which $40,000 deducted from the sum of $213,532.49, so, as aforesaid, due said Clark, leaves due and owing by said Railway Company and now payable on said contract to said Heman Clark, the sum of $173,532.49.

Now, therefore, be it known, that I, the said Heman Clark, have received of and from the said Chicago, Milwaukee and St. Paul Railway Company the sum of one hundred and seventy-three thousand five hundred and thirty-two and 49/100 dollars ($173,532.49), in full satisfaction of the amount due me on said estimates, and in full satisfaction of all claims and demands of every kind, name and nature, arising from, or growing out of, said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of said Railway Company to account for said forty thousand dollars, as hereinbefore provided.

HEMAN CLARK.

WM. C. EDWARDS."

This document was prepared by defendant and sent to plaintiff with the information that upon its signature and return a check would be delivered to him for the sum named. It will be noted that by the terms of this receipt the disputed items,—nut-locks and overtime penalty,—are both disposed of according to defendant's contention, the penalty in an item by itself and the nut-locks by inclusion,

(as the referee finds) of the $9,558.63 in the item of $3,626,865.20 "paid on account." The referee held that this transaction of March 9, 1898, did not constitute an accord and satisfaction, for the reason that the agreement whereby Clark undertook to give up his claims against the Company for the nut-locks and overtime penalty was "without consideration of any kind, but was a simple, uncompensated surrender of lawful rights on his part." The referee's opinion states his conclusion as follows: "The claim of Clark against the Company, for the sum of $3,930,397.69 was a liquidated sum, liquidated by the umpirage of the Chief Engineer as proved by the final certificate and estimate, and by this receipt prepared by the Company: * * it could not be discharged by the payment of a smaller sum. Had it been an unliquidated or disputed claim, or a claim upon a *quantum meruit* requiring a valuation of worth or material, different considerations might arise, but these are, properly speaking, undisputed claims. There are claims which the Company had no right to dispute, and the written concession contained in this receipt by Clark was based upon no consideration whatever."

The agreement between parties which is known to the law as "accord and satisfaction" is a contract and like all other contracts it needs a consideration to make it valid: without consideration it is *nudum pactum*. The consideration may present itself in many different shapes; it may be found in premature payment, in payment in some manner different from that bargained for in the original contract, in the giving of some desired article in place of money, in the giving of further security or of different security for the reduced amount, in mutuality of concession, in abandonment of a right to litigate or to appeal; but in some form or other a consideration must be found. There must be some advantage, or presumed or assumed advantage accruing to the party who yields his claim. "The accord and satisfaction must be advantageous to the creditor. He must receive from it a distinct benefit which otherwise he would not have had. Thus to an action for

wrongfully taking cattle, it is no plea that it was agreed plaintiff might have them, for this the law would have given him." *Parsons on Contracts (8th Ed., Vol. 2, p. 804).* "In order to estabish a defence of this character there must be present in the transaction, upon which it rests all the elements of a complete contract—a lawful subject-matter, a sufficient consideration, and the *aggregatio mentium*, or mutual assent of the parties." *Fuller* v. *Kemp* (1893), 138 *N. Y.* 236. "A creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum*. But if there be any benefit or even any legal possibility of benefit to the creditor thrown in, that addiiional weight will turn the scale and render the consideration sufficient." *Goddard* v. *O Brien (L. R. 9 Q. B. Div. 37).* "All that is necessary * * is a sufficient consideration to support the substituted agreement. The doctrine is fully sustained in *Allison* v. *Abenroth*, (108 *N. Y.* 470), ANDREWS, *J.*, 'where there is an independent consideration, or the creditor receives any benefit, or is put in a better position' etc." *Jaffray* v. *Davis* (1891), 124 *N. Y.* 164. "An accord and satisfaction * * must be an executed contract founded upon a new consideration." *Nassoiy* v. *Tomlinson* (1896), 148 *N. Y.* 326. The adequacy of the consideration will not be gone into by the Court, if it be what is known to the law as a "valuable consideration."

This principle that there must be some benefit or possibility of benefit to the creditor, fundamental though it be, seems not always to have been kept in mind. There are reported cases in which accord and satisfaction is found by the Court, where it is impossible to determine from the opinion and the statements of facts whether or not the creditor received any consideration whatever: See *Palmerton* v. *Huxford* (1847), 4 *Denio*, 164; *Preston* v. *Grant* (1861), 34 *Vermont* 201. There are others in which a like decision is reached although a careful analysis of the facts as reported would seem to indicate the entire absence of any consideration. See *L'Estienne* v. *Ernst* (1896), 5 *App.*

Div. 373; *East River Lumber Co.* v. *Brown* (1895), 68 *Vermont* 239; *Hills* v. *Sommer* (53 Hun 392). In neither of these groups of cases does the precise point under discussion appear to have been brought to the attention of the Court. There are other cases in which the question of consideration is not discussed, but so much is said as to the tender of the money or a draft by one party being clogged with a condition, which will operate to bind the other party if he accepts it, that it might almost be thought the defence was being upheld upon some principle of estoppel.

The referee was sound in holding that a receipt in full and payment of balance stated therein cannot be sustained as an accord and satisfaction, unless some benefit was thereby secured to the creditor, which but for the settlement he would not have had. This is the rule laid down in terse and precise terms in a case repeatedly cited on the brief of plaintiff in error, where accord and satisfaction is defined as "something of legal value, to which the creditor before had no right, received in full satisfaction of the debt without regard to the magnitude of the satisfaction." *Bull* v. *Bull* (1876), 43 *Conn.* 455. Where upon settlement the only items in dispute are resolved in the debtor's favor, no consideration passes unless the creditor's claim is "unliquidated" using that word as meaning that as to the items which he receives upon the settlement, he would be compelled, but for a settlement, to bear some further burden in order to have their amount so fixed that the debtor would be bound thereby. This is always the case where the creditor's claim rests upon a *quantum meruit*. Thus where a physician charged $5 a visit for 126 visits, and $10 each for 4 consultations, no agreement having been made in advance as to the rate to be charged, the Court said: "The original contract, which the law implied, was an agreement on the part of the defendant to pay the plaintiff what his services were reasonably worth. From the very nature of the case, a further agreement must be reached by the parties, fixing the value of the services or else resort must be had to a judicial determina-

tion for that purpose." *Fuller* v. *Kemp* (1893), 138 *N. Y.*, 236. In that case the consideration, on which accord and satisfaction was sustained, was the giving up by the debtor of his right to compel the plaintiff to resort to judicial determination to fix the *quantum meruit* of the visits he did make—even if there were no dispute as to their number. And it is manifest that it makes no difference when such a claim is being adjusted that the creditor agrees to a *quantum meruit* which he was always willing to pay, because so long as the fixation of the amount rested merely on his good-will, he was still in a position to change his mind, he could still in perfect good faith verify an answer, which would make it necessary for the creditor to " liquidate " his claim by a law suit. In such a case it may nevertheless be said that the amount finally paid was " not disputed," using these words without technical precision, and thus we find many cases in the reports in which it would appear on a casual inspection as if the payment of an undisputed indebtedness was held sufficient to sustain an accord and satisfaction. And in some cases the terms " liquidated " and " unliquidated " are used without any very exact attention to the real distinction between them ; indeed in most of the reported cases it was wholly unnecessary to note such distinction since the presence of a valuable consideration is entirely plain. The rule of law as to accord and satisfaction is usually stated thus : " Payment by a debtor of a part of his liquidated debt is not a satisfaction of the whole unless made and accepted upon some new consideration ; but where the debt is unliquidated the rule does not apply." When, however, a creditor's claim is made up in part of an amount so adjusted by agreement of the parties that the debtor can not in good faith contest it, and in part of an amount not thus adjusted, and the debtor pays only the adjusted portion of the claim, and insists on a release of the entire claim, including the unadjusted portion, without any new consideration moving to the creditor, reason and principle would require a decision that there has been no accord and satisfaction, and, except for the few cases referred to above where the

point was not discussed, the authorities are in harmony with such a decision. The rule might be more accurately stated: "Payment by a debtor of a liquidated amount, presently due and to which he has no defence that can be urged in good faith or with color of right, is not by itself a sufficient consideration to sustain a release by the creditor of other unliquidated claims against the debtor." Of course it makes no difference that eventually it turns out that some supposed legal defence of the debtor is held to be insufficient; if he is in a position to litigate in good faith and with some color of right and gives up his right to throw the claim into Court, he gives a valuable consideration for any settlement, and no claim to which such a defence may be interposed can be fairly called a liquidated claim, even to the extent to which the debtor may have theretofore expressed his willingness to pay. "If it appears that the claim furnished opportunity for controversy, although a favorable result could not have been safely predicted, * * sufficiency of consideration would be established." *Zoebisch* v. *Von Minden* (1890), 120 *N. Y.* 406. And see *Nassoiy* v. *Tomlinson* (1896), 148 *N. Y.* 326; *Farmer's Bank* v. *Blair* (1865), 44 *Barb.* 641; *Conn. River Lumber Co.* v. *Brown* (1895), 68 *Vermont* 239; *Fuller* v. *Kemp, supra.*

Analysis of the leading reported cases will show that, although it is not always discussed in the opinion, a valuable consideration is found to be present wherever a defence of accord and satisfaction has been sustained. The brief filed by the learned counsel for plaintiff in error presents such a comprehensive selection of authorities that it will be sufficient to refer to citations.

First to be considered is a group of decisions of the U. S. Supreme Court, where claimants for supplies furnished to the government were held foreclosed by receipt in full and acceptance of part of their original claims. It should be remembered that the U. S. Treasury pays only out of appropriations and upon audit. There being many claims for military stores furnished during the civil war, Congress created a special board to pass upon their validity and

amount; no one was required to bring his claim before such board, but, if he did, payment was at once secured to him of whatever amount the board might find due, out of a special appropriation made for the purpose. Payment on all these claims out of the ordinary appropriations had been suspended by order of the Treasury Department. "From the time the Secretary issued his order, suspending the payment * * * they must be regarded as claims disputed (*i. e.* the whole claim) by the government; and unless the board had been constituted, could have been adjusted only by Congress or the Court of Claims"; (7 *Wall* 463). In all these cases the amounts paid in settlement were unliquidated, since but for the finding of the Board, the government could have litigated them all in good faith, and in giving up resort to the Court, at the same time going to the expense of constituting a special tribunal to adjust the claims, and securing the more expeditious payment of what might be found due, there was certainly abundant consideration to sustain the settlements. *U. S.* v. *Adams* (1868), 7 *Wall* 463; *U. S.* v. *Child* (1870), 12 *Wall* 232; *U. S.* v. *Justice* (1871), 14 *Wall* 15. In *Sweeny* v. *U. S.* (1872), 17 *Wall* 77, the claim was clearly unliquidated as to every part of it, involving the question of reasonable compensation; a circumstance which appears from the opinion:—"Enough appears to satisfy the Court that the charter party was superseded, and that the claim in fact was for a *quantum meruit* and as such that it was a proper subject of compromise." In *U. S.* v. *Martin* (1876), 94 *U. S.* 400 plaintiff, a laborer, claimed extra pay under some construction of the eight-hour law. He presented his claim to the auditor in 1873 and received $205 giving a receipt in full. He subsequently brought suit for the balance in the Court of Claims. The payment of the $205 was a sufficient consideration since the entire claim was fairly disputable in the Courts. In *Baird* v. *U. S.* (1877), 96 *U. S.* 430, plaintiff had a contract with the government to furnish certain locomotives. The stipulated price was first, a fixed sum for each locomotive; second, any advance there might be after a certain

date in cost of labor and materials; and, third, any damages resulting from giving the government's order preference over others. The fixed price had been paid, and the damages recovered by suit. Plaintiff presented a claim for $151,588 for entire advance in cost which was audited and allowed for $97,507, and plaintiff informed of the principles upon which the adjustment was made. He took draft for the amount and collected it. Held an accord and satisfaction. Manifestly every dollar of the claim of $151,588 was unliquidated and susceptible of liquidation only by consent of the government or by the Courts. Assent to an adjustment at $97,507 was a valuable consideration. *Pray* v. *U. S.* (1882), 106 *U. S.* 594, is not in point, and in *Boafington* v. *Tuyes* (1886), 120 *U. S.* 198, there was abundant consideration in the abandonment of a right to appeal. In *Fire Ins. Ass'n.* v. *Wickham*, 141 *U. S.* 579, premature payment was held a good consideration.

In *Battle* v. *McArthur*, 49 *Fed. Rep.* 715, plaintiff had a contract for grading a railroad, compensation was at fixed prices for the units of different kinds of work done. There had been a long dispute as to the classification of hard pan by the engineers, *i. e.* as to how many units of rock and earth excavation respectively should be paid for. After the work was done, and the amount of final estimate was being settled on, a conference was had, of which THAYER, *J.* says: "The percentage of loose-rock excavation thus demanded was not allowed, but it caused the chief engineer to raise the classification some 20 per cent. and that increase entered into the final estimate." Here was a concession and payment which certainly constituted a good consideration.

In *Davenport* v. *Wheeler* (1827), 7 *Cow.* 231, there was no agreed price for the salt, the claim was for a *quantum meruit*, and consideration is found in the agreement as to price per pound of the salt paid for, defendant waiving his right to compel plaintiff to go into Court to secure a "liquidation" of his claim as to any part of the salt delivered. *Vedder* v. *Vedder* (1845), 1 *Denio* 257, involved mutual claims for damages for trespass; defendant's liqui-

dation of plaintiff's claim against him at an amount satisfactory to the plaintiff was a good consideration for his agreement to accept it in full. In *Ryan* v. *Ward* (1872), 48 *N. Y.* 204, and *Bunge* v. *Koop*, 48 *Id.* 225, the defence of accord and satisfaction was not sustained; *Gray* v. *Barton* (1873) 55 *N. Y.* 71, was decided upon the principles of law governing "gifts." In *Luddington* v. *Bell* (1874), 77 *N. Y.* 143, the Court found in the giving of the promissory note of a single partner a good consideration for accord and satifaction of a larger claim against the firm. *Coulter* v. *Board of Education*, 63 *N. Y.* 365, is not in point; the cause was decided upon the peculiar language of a clause in the contract, under which the work was done. The claim in *People ex rel McDonough* v. *Board, &c. of Asylum* (1884), 96 *N. Y.* 640, was for a *quantum meruit*. In *Wahl* v. *Barnum* (1889), 116 *N. Y.*, the Court found consideration in the recognition, by the party claiming the benefits of the compromise, of the existence of a partnership which the other party might have found it difficult to establish by suit. There was vigorous dissent, and the consideration is rather vague and shadowy, but the Court clearly recognized the principle here contended for, since it sought for a valid consideration to support the contract. In *Zoebisch* v. *Von Minden* (1890), 120 *N. Y.* 406, the defendant gave up his right to litigate defences. In *Jeffray* v. *Davis* (1891), 124 *N. Y.* 164, the claim was liquidated and the defense of accord and satisfaction was not sustained; the opinion contains an interesting review of the authorities. *Fuller* v. *Kemp* (1893), 138 *N. Y.* 236, has already been discussed *supra*. In *Nassoiy* v. *Tomlinson* (1896), 148 *N. Y.* 326, an action for commissions on sale of real estate, neither fixed sum nor rate per cent. had been agreed upon by the parties in the original contract. When the service was rendered, therefore, the compensation to be paid was wholly undetermined. This case well illustrates the distinction between the words "undisputed" and "liquidated." The real estate sold for $30,000; plaintiff claimed 5 per cent., $1,500; defendants resisted such claim, but were always ready and willing to pay 1 per cent., $300.

This was the sum eventually paid, and receipt in full given, which the Court held to be an accord and satisfaction. Now it might be said that a claim for $300 was "undisputed," since up to the time of payment defendants had not in fact disputed it; but it was not "liquidated" because its amount had not been fixed by agreement of the parties or by litigation or otherwise. Their prior "willingness not to dispute" did not bind the defendants to remain in the same frame of mind; *non constat* but they might at any time, by refusing to agree to any precise amount, throw the plaintiff into Court. Their final liquidation of the claim at $300 and payment thereof cut off absolutely their right to litigate as to the value of the services and was a good consideration.

Hills v. *Sommer* (1889), 53 *Hun.* 392; *Palmerton* v. *Huxford* (1847), 4 *Denio* 164; *Le L'Estienne* v. *Ernst* (1896), 5 *App. Div.* 373; *Preston* v. *Grant* (1861), 34 *Vermont* 201, *Conn. River Lumber Co.* v. *Brown* (1895), 68 *Vermont* 239, have been referred to *supra.*

In *Farmer's Bank* v. *Blair* (1865), 44 *Barb.* 641, the defendants had interposed defenses to an action on the notes, which, if sustained, would prevent recovery. "There is," says the Court, "nothing before us indicating that the defenses were unsubstantial or fictitious; they were solemnly interposed and insisted on." Their withdrawal was held a good consideration. In *Green* vs. *Rochester Manufacturing Co.* (1873), 1 *N. Y. Sup. Ct.* 5, the Court says: "There was, so far as appears, a *bona fide* dispute by the defendants as to whether they were bound to pay the plaintiff anything for what was claimed as extra work; and, at all events, it is not disputed but that whatsoever the plaintiff was entitled to for extra work was upon a *quantum meruit.*" In *Pardee* v. *Wood* (1876), 8 *Hun.* 584, the debtor in addition to paying $1,500 on a $2,000 claim, agreed to make no claim for certain machinery then held by the plaintiff as collateral to an indebtedness from a third person. "This," says the Court, "was a distinct consideration and sufficient to sustain the receipt as a final accord and satisfaction." In *Looby* v. *Village of West*

Troy (1881), 24 *Hun*, 78, the whole claim was disputed on the ground that under its charter the village could not incur liability in excess of appropriation. The abandonment of this defence as to the part paid in settlement was a sufficient consideration. In *O'Donohue* v. *Woodbury* (1850), 6 *Cushing* 148, SHAW, *C. J.* says: "Originally the present was a claim for services, and was for unliquidated damages. *Some* services were admitted to have been rendered, but the amount was denied, and an offer was made of a less sum than that claimed. The case was open to two inquiries, first as to the time of service, and second as to rate." In *Bull* v. *Bull* (1876), 43 *Conn.* 455 certain "pictures" were taken as part of the consideration; in *McDaniels* v. *Lapham* (1849), 21 *Vermont* 222, the sum really due plaintiff was entirely unliquidated and could only be ascertained by having an account taken of the rents and profits, and "whole matter had been involved in protracted litigation for several years." In *Potter* v. *Douglass* (1877), 44 *Vermont* 540, "three was no special agreement between the parties in relation to the amount the plaintiff was to receive for his services and he was therefore entitled to receive only what they were reasonably worth. * * * Doubtless the object which defendant had in view in making the offer was to avoid the present controversy. He would rather buy his peace by paying a sum of money that he did not owe than possibly defeat plaintiff at the end of an expensive and irritating lawsuit." In *Tanner* v. *Merrill* 65, *N. W. Rep.* 564 (*Sup. Ct. of Michigan*), the decision, rendered by a bare majority, entirely sustains the contention of plaintiff in error; but the reasoning is not persuasive, nor the conclusion in harmony with the best authorities.

The next question to be considered is whether the referee properly applied the rules of law above enunciated to the facts found in the case at bar.

It appears, as has already been shown, that at the time the receipt in full, or proposed "accord" was prepared and submitted to plaintiff for his acceptance the amount earned under the contract ($3,895,798.79) was a claim

against the defendant "liquidated" in the strictest meaning of the term. Not only was it undisputed, in the sense that defendants were willing to pay it, but it was no longer open to dispute even if they wished to dispute it. As to the work called for by the contract, that instrument bound the defendant to pay the sum shown by the final estimate to be due, whenever the Chief Engineer should certify to proper completion and he had so certified. The price for such work was fixed by the contract itself. As to the extra work, the Chief Engineer had certified that he had ordered it, that it was done, and had fixed and determined the price for it—and the contract bound the Company to pay the price so fixed. Therefore except for the single defense of payment, the company was wholly without defense to the claim for that sum, $3,895,798.79; it could not contest it in Court "with good faith," nor with "any color of right." Had plaintiff before March 9, 1888, brought suit for the balance of such sum remaining unpaid, after crediting defendant with all the items of payment it asserted it was entitled to charge, the railroad company could not, assuming that its officers were conscientious, even have verified an answer which could have raised any issue or delayed plaintiff's entry of judgment beyond the time necessary to notice a motion for judgment upon the answer as frivolous. As to the items of payment, which the company insisted upon, all were, and always had been conceded by plaintiff, except the cost of the nut-locks and the overtime penalty. When, therefore, both these items were credited to the defendant in the receipt, it parted with nothing—not even a right to litigate,—in agreeing to pay and in actually paying the balance remaining of the liquidated amount earned under the contract after deducting all alleged credits for payment. Hence there was no consideration moving to the plaintiff by reason of the payment of this sum on March 9, 1888, and unless some other benefit to plaintiff can be found to support it, his agreement, implied by receipt in full, to abandon all claim to the cost of nut-locks and overtime charge was without consideration and *nudum pactum*.

By reference to the receipt in full, which is set forth in the 13th finding of fact, it will be found that the instrument disposed of another item, not hereinbefore referred to, in these terms :

" And whereas, the further sum of $34,598.90 should be credited to said Clark for materials sold by him to said Company, and certain rebates and other matters of that description etc."

This sum is by the statement of account set forth in such receipt credited to Clark, and is included in the $173,532.49 paid to him upon his signing such receipt. From what has been said before, it is plain that if, at the time of the transactions relied upon as showing accord and satisfaction, this sum of $34,598.90, so allowed to Clark, represented an unliquidated item the amount of which he would have to establish by evidence in case he had sued to recover it, its allowance to him upon the settlement of March 9, 1888, would be a sufficient consideration to uphold that settlement against him as an accord and satisfaction of all its claims.

The findings of fact do not give much information as to the details of this item. It is suggested that the testimony in the case shows that it covers surplus materials, such as rails, spikes, bolts, etc., which Clark had brought on the line of work, but had not needed ; that it being more advantageous to sell them where they lay than to transport them elsewhere, plaintiff had agreed with defendant that it would take them off his hands, had made " a trade outside of the contract." But with the testimony this Court has nothing to do. It sufficiently appears from the findings that part at least of this sum was for " materials sold by [Clark] to said Company." From the engineer's certificate which is included in the findings it appears that this item represented no part of the work specified under the contract, and no part of the extra work and materials ordered by him ; that it was not included in his certificate nor in the final estimate, that he made no decision about it one way or the other, and apparently that he never undertook to pass upon it. Therefore it was

not liquidated by the original contract, nor by any action of the Chief Engineer thereunder. Indeed it is plain to a demonstration from the findings that the item in question was not included either in the original contract or in the extra work, and must represent an additional and independent contract of sale. What the terms of that contract of sale were the findings do not disclose; if they were of such a character as to leave the price of the articles sold open to future adjustment, and if no binding agreement of the parties had subsequently adjusted such price; in other words if on March 9, 1888, the situation was such that the plaintiff, put to his suit, could have recovered this item only by proof of amount furnished or of reasonable value, or of both, then it was an unliquidated item; and its allowance to the plaintiff on settlement would be a good consideration to support the contract of accord and satisfaction. If on the contrary before that time, either when the independent contract was made or later, the parties had settled upon the quantities delivered and had agreed upon the price, not by some mere expression of willingness to pay a particular amount, but in such a way as to preclude further litigation "in good faith" or "with any color of right,"—then the allowance and payment of the $34,598.90 would not constitute good consideration.

The only light we have upon this question is found in a single clause,—indeed practically in a single word—of the fourteenth finding of fact: "That said receipt and paper contained an accurate, truthful and *undisputed* account of all dealings, between said parties, except in the matter of the forfeiture, etc."

It is quite manifest from the findings and conclusions that the referee uses this word "undisputed" as synonymous with liquidated. He was evidently satisfied from the testimony that the prior transactions between the parties were such that this sum was no more open to dispute than was the sum of $3,895,798.79 to which the Chief Engineer had certified. By what process it was so liquidated does not appear in the findings, and no one seems to have asked the referee to find the facts more specifically. We

must take his finding, therefore, as conclusive upon the question and assume that either by agreeing for a price in advance, or subsequently, by entering into some binding agreement as to the sum to be paid, the defendant had lost its right to throw the plaintiff into Court as to that item. Its allowance and payment therefore could not constitute a good consideration for the alleged accord and satisfaction.

It will be perceived that upon the settlement the railroad company retained $40,000 to meet claims. As to this the referee has found that

"The defendant Railway Company has duly accounted for the expenditure of the said sum of $40,000 so reserved as aforesaid to meet, or as an indemnity against, claims which were made against said Company for liens of workmen and claims of sub-contractors, and other claims for damages paid by the defendant Railway Company, and for the expenditure of $521.75 in addition thereto, which sum the defendant Railway Company is entitled to recover from the plaintiff, with interest."

No one disputes the correctness of this conclusion.

As to the fifth cause of action the referee found as follows:

"19. That, in or about the months of March and April, 1888, the plaintiff was the owner of 97,000 feet B. M. bridge timber then in the yard of the defendant at Chillicothe and along the line of the railroad.

"20. That the said lumber did not conform to the standard of the defendant, and was not purchased by the defendant from the plaintiff, or allowed in the final certificate of the Chief Engineer, under the contract in this section to the plaintiff.

"21. That, in and about the month of June, 1888, the defendant took possession of the said lumber and converted the same to their own use without assent or knowledge of the plaintiff.

"22. That the value of the said lumber at the time of the taking, in June, 1888, was $2,425."

Having waived the tort and elected to sue on implied contract plaintiff could quite properly include this cause of action in his complaint. The transaction out of which it arose took place after the making of the engineer's final certificate, and after the signing of the receipt in full; it would therefore, be in no ways affected thereby whether such receipt in full be held to constitute an accord and satisfaction or not. Upon these findings the conclusion of law that "plaintiff is entitled to recover from the defendant the sum of $2,425 with interest from June 1, 1888, for the conversion by the defendant of lumber belonging to the plaintiff" is manifestly correct. Indeed the only objection urged by plaintiff in error is that there was not competent evidence to sustain the findings of fact; but that question is not reviewable here.

It seems proper to call attention to the fact that the Court has been greatly hampered and embarrassed by the inordinate size of the record in this case. In view of the well-settled limitations which confine the reviewing Court, in such cases, strictly to questions of law it would seem desirable that the record should be restricted to the presentation of such questions only.

The judgment of the Circuit Court is affirmed.

C. W. Bangs and *Burton Hanson*, for the Plaintiff in Error.

L. Laflin Kellogg, for the Defendant in Error.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 51.—October Term, 1898.

Submitted January 24, 1899. Decided March 15, 1899.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Plaintiff in Error,

vs.

HEMAN CLARK,
Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

Before Judges WALLACE and LACOMBE.

WALLACE, *Circuit Judge.*—This is a writ of error brought by the defendant in the court below to review a judgment for the plaintiff ordered by the court upon the confirmation of the report of a referee before whom the action was tried by the stipulation of the parties. The report contains a full finding of the facts by the referee, and sets forth his legal conclusions thereon. Only those assignments of error can be considered which present the question whether upon the facts found by the referee the judgment is wrong. *Roberts* vs. *Benjamin* (124 *U. S.* 64); *Shipman* vs. *Straitsville Mining Co.* (158 *U. S.* 856).

Most of the assignments of error present the question whether the defense of accord and satisfaction set up in the defendant's answer should not have been sustained and adjudged to preclude any recovery by the plaintiff. The material facts bearing on this question which appear in the findings of the referee may be summarized as follows: The plaintiff had contracted with the defendant to construct a certain railway, and by the terms of the written contract between the parties the defendant, among

other things, undertook that whenever its chief engineer should furnish it his certificate that the railway had been finished and all the conditions of the contract been fully performed, and his final estimate of the amount due the plaintiff therefor, the defendant would pay the amount of the estimate less such payments as should have been already made. The contract provided that the estimate of the engineer should be final and conclusive between the parties.

The parties had also entered into a supplemental contract whereby the plaintiff agreed to complete his performance of the original contract on or before June 1, 1887, and in case of failure so to do, to allow the defendant, by way of forfeiture, the sum of $40,000.

The railroad was completed, and the chief engineer of the defendant furnished the certificate and final estimate pursuant to the contract. The certificate was given March 3, 1888. It stated the sum earned by the plaintiff under the contract including deductions and additions for deviations at $3,895,798.79. At that time the defendant had made payments to the plaintiff in money and materials amounting to $3,615,306.57, and if certain nut-locks were included, amounting $3,626,865.20.

During the performance of the contract the defendant supplied the plaintiff with certain nut-locks and desired him to use them in constructing the tracks. The plaintiff insisted that the contract did not require him to use them. Thereupon it was arranged that he should use them, and the question whether they were to be used at his expense or that of the defendant should remain open until the completion of the railway.

The plaintiff did not complete the contract by June 1, 1887, but his delay was wholly owing to his inability to do so by reason of the failure of the defendant to acquire certain rights of way which by the contract it had agreed to acquire.

Upon a matter of account outside the contract the defendant was indebted to the plaintiff for materials bought of him, etc., in the sum of $34,598.90.

March 9, 1888, the defendant rendered to the plaintiff a statement of account, crediting the plaintiff with the sum of $3,895,798.75, according to the engineer's estimate, and with the further sum of $34,598.90 for materials, etc.; and debiting him with payments amounting to $3,626,865.20 including $9,558.63 for the nut-locks, and also debiting him with the sum of $40,000 for failure to complete the contract by June 1, 1887. As thus rendered the account stated as the balance due plaintiff the sum of $173,532.49. Annexed to the statement was a receipt which recited that the plaintiff had received $173,532.49 in full satisfaction of the amount due him upon the estimate, and of all claims and items of every kind, name and nature arising from or growing out of the said contract and of the construction of the said railroad. The plaintiff signed the receipt, and thereupon the defendant paid the plaintiff $173,532.49.

The referee found that the statement rendered by the defendant "contained an accurate, truthful and undisputed account of all dealings between said parties" except in respect to the $40,000 debited for time forfeiture, the $9,558.63 for nut-locks embraced in the $3,626,865.20, and another small item which accrued subsequently to which reference is unnecessary.

The referee found as conclusions of law, (1) that at the time of signing the receipt the plaintiff was not indebted to the defendant upon the item for nut-locks, (2) that the plaintiff was not liable for the item of $40,000 debited to him for failure to complete the railroad by June 1, 1887, (3) that when it rendered the statement of account the defendant was indebted to the plaintiff in the sum of $49,558.63 in addition to the sum of $173,532.49 paid by it upon receiving the receipt, (4) that the delivery of the receipt and the acceptance of the payment by the plaintiff did not constitute a valid payment or accord and satisfaction of the said sums of $9,558.63 and $40,000, or either of them, or any part of them; and that the plaintiff was entitled to recover the sum of $49,558.63 with interest from March 9, 1888.

The assignments of error thus raise the question whether the acceptance of $173,532.49 by the plaintiff, upon a promise to receive it in full of all his demands, was a settlement and satisfaction of his demands against the defendant which amounted to $49,558.63 more than that sum. If there was no consideration for his promise the conclusion of the referee was correct. If there was a sufficient consideration for it the assignments of error are good.

A promise by a creditor having a liquidated and undisputed demand against his debtor, which is wholly due and payable, to discharge the residue upon receiving payment of a part is according to all authorities *nudum pactum*, and totally inoperative, because the debtor is under a legal obligation to pay the whole demand. A demand is not a disputed demand merely because the debtor refuses to pay or recognize it, for if this were true no case would ever arise for the application of the rule. It is disputed within the meaning of the rule only when it is so far disputable as to present a "proper case for litigation." *Tuttle* vs. *Tuttle* (53 *Mass.*, 551); *Zoebisch* vs. *Von Minden* (120 *N. Y.*, 406); *Honeyman* vs. *Jarvis* (79 *Ill.*, 318). A demand is a liquidated demand when it is of such nature that its exact pecuniary amount is either ascertained or ascertainable by simple computation.

It is conceded that as to the part of the plaintiff's demand established by the certificate of the engineer it was a liquidated and undisputed demand against the defendant in the sense in which these terms are used in considering the validity of a promise to accept a part payment in satisfaction of the whole demand. The other part of the plaintiff's demand, that for the materials, etc., purchased of plaintiff by defendant, was, according to the referee's finding, undisputed in fact between the parties, and this being so it is quite unnecessary to inquire whether it was originally one in respect to which there might have been a fair difference of opinion between the parties as to the amount due. The statement of account rendered by the defendant is evidence as against the defendant not only that it was an undisputed demand but one the amount of

which had been ascertained by the parties. If the amount had been ascertained it was a liquidated demand. As no facts appear in the findings of the referee to the contrary, it is to be concluded that this part of the plaintiff's demand was also liquidated, as well as undisputed by the defendant.

The case is not precisely one where the debtor refuses to pay the whole of an undisputed and liquidated demand, and exacts a promise from his creditor to receive part in satisfaction of the whole. Strictly it is one where the creditor having two undisputed and liquidated demands against the debtor, and the latter, claiming to have cross demands or counter claims against the creditor, refuses to pay the creditor's demands unless the validity of the cross demands is acknowledged and their amount allowed to him by the creditor. By the statement of account and the receipt annexed to it the defendant in fact took this position, and notified the plaintiff that as a condition to paying the demands which it conceded to be due the plaintiff the latter must allow and deduct the debited items for the nut-locks and the forfeiture. Upon this state of facts a promise to allow the whole amount of the cross demands has no consideration to sustain it, because in contemplation of the law no benefit could accrue to the promisor and no injury to the promisee. The promisor derives no benefit because he allows the whole; the promisee is not injured because he relinquishes nothing.

The authorities are not altogether in accord upon the question whether in order that there may exist a valid consideration for a compromise both parties must concur in supposing the demand to be doubtful in point of right or amount, or whether it suffices if the claimant only entertains this belief and honestly supposes that he has a valid demand. If the claimant, knowing his demand to be groundless, coerces a compromise, the compromise is uniformly declared to be without consideration. On the other hand it is well settled that there is a sufficient consideration when both parties regard the demand as possibly capable of enforcement. In *Union Bank of George-*

town vs. *Geary* (5 *Peters*, 99), the court said: "It is enough that the bank considered it a doubtful question; and that they supposed they were getting some benefit by foreclosing all inquiry on the subject; and the complainant by precluding herself from setting up the defence waived what she supposed might have been of some material benefit to her." See also *Callisher* vs. *Bischoffshein* (*L. R.*, 5 *Q. B.*, 549); *Keefe* vs. *Vogle* (36 *Iowa* 87); *Flannigan* vs. *Kilcome* (58 *N. H.*, 443); *Clark* vs. *Turnbull* (47 *N. J. L.*, 265); *Connecticut River Lumber Co.* vs. *Brown* (68 *Vt.*, 239); *Wahl* vs. *Barnum* (116 *N. Y.*, 87); *McKinley* vs. *Watkins* (13 *Ill.*, 140). As in the present case no concession was made by the defendant, and the allowance of its demands in full were exacted as a condition of paying the demands of the plaintiff, there was no compromise; and it is immaterial that the defendant may have asserted its demands in good faith when it appears that they were in fact and in law without foundation. We conclude that the assignments of error which have been considered are not well taken.

By signing the receipt and acquiescing for a considerable period in the correctness of the account rendered by the defendant the plaintiff was not precluded from recovery. An account stated is an admission that the account is correct, and if the party to whom it is rendered omits to communicate objections to the other party within a reasonable time, an inference may be drawn that he was satisfied with it; but there is no arbitrary rule of law which renders the omission to object in a given time equivalent to an actual agreement or a consent to the correctness of the account. An account settled is stronger evidence, and requires more proof to overcome it than a mere account stated. But the parties are never concluded, except by the statutes of limitation, from proving the incorrectness of the account unless the case is brought within the principles of an estoppel in *pais*, or of an obligatory agreement between them. *Lockwood* vs. *Thorn* (18 *N. Y.* 285); *Perkins* vs. *Hart* (11 *Wheaton*, 237).

Other assignments of error impugn the conclusions of the referee in disallowing the demands of the defendant for the nut-locks and for the forfeiture. There are no provisions in the contract which expressly or by implication required the plaintiff in constructing the railroad to use the nut-locks unless found in that provision by which he undertakes to "finish in every respect in the most substantial and workmanlike manner all the work hereinafter specified." The referee did not find that this provision had not been complied with. Nor is there any finding or any evidential facts in the report to authorize the conclusion that the parties at the completion of the work had come to an understanding by which the expense of these articles was to be borne by the plaintiff. It is too plain to require discussion that, if the failure of the plaintiff to complete performance of the contract on or before June 1, 1887, was caused wholly by the default of the defendant in failing to acquire the rights of way necessary to be acquired before the work could be completed, the claim of the defendant for the $40,000 was without foundation.

The 15th and 16th assignments of error relate to that part of the recovery which proceeds upon the conversion by the defendant of certain bridge timber belonging to the plaintiff, a cause of action which arose subsequently to the settlement between the parties of March 9, 1888. Neither of these assignments can be considered; the first because it impugns a ruling of the referee made during the progress of the trial, and the second because the decision of a motion for a new trial is not reviewable.

We find no error in the record and conclude that the judgment was correct.

It is therefore affirmed with costs.

C. W. Bangs and *Burton Hanson*, for the Plaintiff in Error.

L. Laflin Kellogg, for the Defendant in Error.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss. :

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 542, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of Chicago, Milwaukee and St. Paul Railway Company against Heman Clark as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 31st day of March in the year of our Lord one thousand eight hundred and ninety-nine and of the Independence of the said United States the one hundred and twenty-third.

WM. PARKIN,
Clerk.

[SEAL.]

{ U. S. Int. Revenue Stamp. 10 cts. Canceled. }

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which The Chicago, Milwaukee & St. Paul Railway Company is plaintiff in error and Heman Clark is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. 256, October term, 1899. The Chicago, Milwaukee & St. Paul Railway Co. *vs.* Heman Clark. Writ of certiorari. United States circuit court of appeals, second circuit. Filed May 5, 1899. William Parkin, clerk.

United States Circuit Court of Appeals, Second Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Plaintiff in Error,
vs.
HEMAN CLARK, Defendant in Error.

It is hereby stipulated that the transcript of record of the proceedings in the United States circuit court of appeals for the second circuit in the above-entitled cause, including the transcript of record of the proceedings in the circuit court of the United States for the southern district of New York, in the suit of Heman Clark, plaintiff, *vs.* The Chicago, Milwaukee & St. Paul Railway Company, defendant, certified by the clerk of this court on the 31st day of March, 1899, and filed in the office of the clerk of the Supreme Court of the United States on the 7th day of April, 1899, be and stand as the record and return to be made and certified by the said circuit court of appeals to the said Supreme Court of the United States pursuant to the writ of certiorari issued out of and under the seal of said Supreme Court on the 25th day of April, 1899, to said circuit court of appeals, together with the order or judgment of affirmance entered in said circuit court of appeals, and any other matter which may remain of record in said cause in said circuit court of appeals not before certified to said United States Supreme Court.

Dated May 4th, 1899.

BANGS, STETSON, TRACY & MACVEAGH,
Att'ys for Plaintiff in Error.
KELLOGG, ROSE & SMITH,
Att'ys for Def't in Error.

At a stated term of the United States circuit court of appeals in and for the second circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 4th day of May, one thousand eight hundred and ninety-nine.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, circuit judges.

Chicago, Milwaukee & St. Paul Railway Company, Plaintiff in Error, *vs.* Heman Clark, Defendant in Error.	No. 51, October Term, 1898.

Error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the southern district of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said circuit court be, and it hereby is, affirmed with costs, and that this order be entered *nunc pro tunc* as of March 15th, 1899.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. J. W.
E. H. L.

Approved:

Kellogg, Rose & Smith,
Att'ys for Def't in Error.

[Endorsed:] United States circuit court of appeals, second circuit. Chicago, Milwaukee & St. Paul Railway Co., plaintiff in error, *vs.* Heman Clark, defendant in error. Order of affirmance and for mandate.

To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made, except the order for mandate, having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, together with the decree of this court in said cause, as provided in said stipulation, and under direction of counsel for plaintiff in

error said stipulation and decree are certified as a return to this writ.

New York, May 5th, 1899.

[Seal United States Circuit Court of Appeals, Second Circuit]

WM. PARKIN,

Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Tent-cent U. S. internal-revenue stamp, canceled 5, 5, '99. W. P.]

[Endorsed:] United States circuit court of appeals, second circuit. Chicago, Milwaukee & St. Paul Railway Co. *v.* Heman Clark. Return to writ of certiorari.

[Endorsed:] File No., 17,358. Supreme Court U. S., October term, 1899. Term No., 256. The Chicago, Milwaukee & St. Paul Railway Co., petitioner, *vs.* Heman Clark. Writ of certiorari and return. Filed May 9, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.—NO. 773.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Petitioner, vs. HEMAN CLARK, Respondent.	On Petition for *Certiorari*.

Brief for petitioner, The Chicago, Milwaukee and St. Paul Railway Company, upon application for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review the decision of the said Circuit Court of Appeals in the case of the Chicago, Milwaukee and St. Paul Railway Company, Plaintiff in error, against Heman Clark, Defendant in error.

This application involves a consideration of the question whether the decision of the Circuit Court of Appeals for the Second Circuit, in the case above mentioned, is not so far contrary to or inconsistent with the decisions of the Supreme Court of the United States and of other Circuit Courts, as well as decisions of the Courts of different States, in reference to the matters and questions of law involved in, and which were the

subject of controversy in, the said case, as to require that the said case should be certified to the Supreme Court for its review and determination under and pursuant to the provisions of Section 6 (Paragraph 2) of the Act of Congress of March 3, 1891, establishing Circuit Courts of Appeal, and for other purposes.

The questions involved in this application, and which appear upon the record of the proceedings in the said case in the Circuit Court of Appeals, refer and relate almost exclusively to the legal character and effect of a certain instrument or agreement in the nature of a release or acknowledgment of satisfaction, made and entered into between the parties to this case on March 9, 1888, of which the following is a copy:

" WHEREAS, a final estimate has been made by D. J. " Whittemore, Chief Engineer of the Chicago, Mil- " waukee and St. Paul Railway Company, of all the " work done and material furnished under the con- " tract made between said Railway Company and " Heman Clark, bearing date March 6th, 1886, for " the construction of the railroad from Ottumwa, in " Iowa, to the Missouri River, including all extra " work performed and material furnished of every " kind and description; which estimate, with the " prior monthly estimates, less deductions made for " work not done and work assumed by said company, " amounts to.....$3,895,798 79

" AND WHEREAS, the further sum of..... $34,598 90 " should be credited to said Clark for materials sold " by him to said company, and certain rebates and " other matters of that description, making, with the " amount of said estimates, the sum of $3,930,397 69

" AND WHEREAS, the said Chicago, Milwaukee and St. " Paul Railway Company has paid the said Clark to " apply on said contract, in money, material, labor " and transportation, the sum of..... $3,626,865 20

" AND WHEREAS, by the terms of Section 4, Article 13, " of said contract, said Clark was to be charged in " addition for transportation the sum of $50,000 00 " and by a supplemental contract was to allow the " said Railway Company, by way of forfeiture in " case said railway was not completed by the first " day of June, 1887 the further sum of $40,000 00 " making the amount paid on said contract, together

" with the allowance of said transportation and the
" allowance of said forfeiture, the sum of $3,716,865 20
" leaving the amount still due said Clark on said
" contract the sum of ---------- $213,532 49

" AND WHEREAS, in and by said contract it was pro-
" vided that the said Heman Clark, party of the first
" part, should save the said Railway Company free
" and harmless from all claims that might be made
" against said Railway Company for liens of work-
" men and claims of subcontractors, and from all
" damages arising from not keeping sufficient fences
" to preserve crops and restrain cattle, and from all
" damages for cattle or other domestic animals killed
" or injured, and from all damages suffered by said
" subcontractors and employees while engaged upon
" said work, of which said class of claims, about
" $40,000 in amount, have been made upon and are
" now pending in courts by divers claimants against
" said Railway Company, and the sum of $40,000 of
" the amount so due as aforesaid under said con-
" tract to the said Heman Clark has been reserved
" and set aside by said Railroad Company as indem-
" nity or security for the payment of said claims and
" of such other claims of the same class as hereafter
" be made, in case said claimants or any of them re-
" cover judgments against said Railway Company,
" and the said $40,000, or the balance thereof, after
" paying and settling such claims as may be estab-
" lished against said Railway Company, is to be paid
" over to the said Heman Clark as soon as said
" claims are satisfied or said Railway Company
" suitably indemnified from any loss on account of
" the same; which ---------- $40,000 00
" deducted from the sum of ---------- $213,532 49
" so as aforesaid due said Clark, *leaves*
" *due and owing by said Railway Com-*
" *pany and now payable on said con-*
" *tract to said Heman Clark* the sum of $173,532 49

" NOW, THEREFORE, BE IT KNOWN, THAT I, THE SAID
" HEMAN CLARK, HAVE RECEIVED OF AND FROM THE SAID
" CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY
" THE SUM OF ONE HUNDRED AND SEVENTY-THREE THOUSAND
" FIVE HUNDRED AND THIRTY-TWO AND $\frac{49}{100}$ DOLLARS
" ($173,532.49), IN FULL SATISFACTION OF THE AMOUNT DUE
" ME ON SAID ESTIMATES, AND IN FULL SATISFACTION OF ALL
" CLAIMS AND DEMANDS OF EVERY KIND, NAME AND NATURE,
" ARISING FROM, OR GROWING OUT OF, SAID CONTRACT OF

" MARCH 6TH, 1886, AND OF THE CONSTRUCTION OF SAID " RAILROAD, excepting the obligation of said Railway " Company to account for said forty thousand dollars " as hereinbefore provided.

" HEMAN CLARK.

" WM. C. EDWARDS."

(Record, pp. 113–115, fols. 339–345 ; and also pp. 203–206, fols. 609–616.)

This instrument was set up by the Railway Company as a defense in an action brought in the Supreme Court of the State of New York by Heman Clark some five years and a half after the execution and delivery of it, and after the payment of $173,532.49 therein stated to have been paid in full satisfaction, to recover some $305,000 claimed to be due to him on account of the construction of the railroad therein referred to, and for extra work and other claims growing out of the contract. The case was removed to the U. S. Circuit Court, Southern District of New York, on the ground of diverse State citizenship of the parties.

One of the causes of action was based upon allegations that there were $71,057.63 unpaid upon the amount earned by and due to the plaintiff for work done under the contract and other matters, which amount it was claimed upon the trial of the cause was made up or consisted in part of a sum of $9,558.63 for nut locks furnished by the R. R. Co. to and used by Clark in the construction of the road, which had been charged to Clark by the railway company as a part payment on the contract, and was included in and as a part of the sum of $3,626,865.20 which was stated in the said receipt or acknowledgment as having been paid to Clark to apply on the contract in money, material, labor and transportation ; and another part of which consisted of the sum of $40,000, which, as stated in the said acknowledgment, " by a supplemental contract," Clark " was to allow to the Railway Company, by way of forfeiture, in case said railway was not completed by the first day of

June, 1887;" as to both of which items or matters it will be seen that they were embraced in and formed a part of the settlement evidenced by the acknowledgment of March 9, 1888.

The balance of the claim of $71,057.63 claimed to be unpaid was for part of the $40,000 stated in said instrument as reserved to meet claims, which it was claimed had not been expended by the railway company for the purposes specified in said receipt, or that the same had been improperly expended to the extent of $21,499; but as to this the trial Court found that the railway company had duly paid out and expended that sum and accounted for such expenditure to Clark, and for $521.71 in excess thereof. *(Record, pp. 136, 219)*

The action below was not brought to set aside this receipt or acknowledgment of satisfaction, nor was anything alleged against it as having been procured by fraud or misrepresentation. In fact, the giving of this receipt or acknowledgment was not alleged at all in the complaint.

The trial Court held that the signing and delivery of this receipt or acknowledgment on March 9th, 1888, and the acceptance of the check for $173,532.49, were as to the two sums of $9,558.63 charged for nut locks, and $40,000 charged by way of forfeiture for non-performance in time, wholly without consideration, and did not constitute any bar to the recovery by the plaintiff of those sums, *(Record, pp. 118, 119, fols. 354-5)*; and that the signing and delivery of said receipt and the acceptance of the check did not constitute a payment or an accord and satisfaction of the said sums of $9,558.63 and $40,000. *(Record, p. 119, fol. 356)*

The Circuit Court of Appeals held that the giving of the receipt and acknowledgment was without consideration, for the reason that the railroad company paid to Clark upon its execution only the amount which it admitted to be due; and that, as Clark received only the amount to which he was entitled anyway, there was

no consideration to him for surrendering his claims as to the nut locks and forfeiture.

In the opinion of Mr. Justice LACOMBE in the Circuit Court of Appeals it is said

" there is nothing in the findings to show that the plaintiff signed this receipt improvidently or without due consideration, *or that it failed in any way to set forth accurately the agreement entered into between the parties on that day ;* nor that the plaintiff was under any pecuniary stress pressing him to accept a smaller sum than was due." *(Record, p. 518)*

That these items of $9,558.63 charged for nut locks and the $40,000 charged for forfeiture were in dispute, appears by the statement of the Referee before whom the case was tried, that

" in February, 1888, the parties endeavored to adjust and ascertain the exact amount remaining due to Clark, *with the result of differences of opinion which ultimately led to this suit.*" *(Record, p. 551, fol. 453)*

And in the opinion of the Circuit Court of Appeals, it is said that it was not understood that the Referee had held, nor did the Court intend to hold

" that there was any bad faith on the part of the company in advancing these claims for the nut locks and for time penalty ; *that both items were legitimate matters of dispute* and unless settled by agreement of the parties might fairly be brought by either party into Court." *(Record, p. 517)*

Nevertheless, the Court held that, although both the $40,000 for time forfeiture and the $9,558.63 for nut locks were embraced within the statement of account in and by which the settlement was made, and were, therefore, embraced in the settlement, and that these two items were in dispute between the parties in good faith until the settlement was made, there was no consideration for the relinquishment of those claims by the plaintiff Clark, for the reason that he only received the amount which was due to him after deducting the amount of those claims.

But it is respectfully submitted that, inasmuch as those items were in dispute in good faith, and were as stated by the Court legitimate matters of dispute, the account itself as a whole, and the amount due, was in dispute, and therefore unliquidated; that the account was an entire thing, and where one or more items of it were in dispute, the account as a whole was in dispute; and when such is the case and a certain amount was received in settlement, which was paid on condition that it was to be received in full satisfaction and settlement of all claims and demands of every kind, name and nature arising from and growing out of the contract and of the construction of the road, such payment was a good consideration for the settlement of the account as a whole. The account, which is an entire thing, comprising all of the credits and debits on both sides, cannot be settled and liquidated by piecemeal. This account was not so settled, but was treated as an entire thing, and settled as such by mutual concessions by each party to the other, the railway company conceding to Clark credit for matters outside of the contract amounting to $34,598.90, and Clark conceding to the railway company the charge for nut locks and the forfeiture.

The decision of the Circuit Court of Appeals that the agreement of March 9, 1888, was without consideration, is, it is submitted, inconsistent with, and contrary to, the decisions of the United States Supreme Court in the cases of the *United States vs. Child, 12 Wallace, 232-243,* and *United States vs. Adams, 7 Wall., 463,* and other cases, notwithstanding the differences which the Court suggests distinguish the decisions in those cases from this one.

In regard to those cases the Circuit Court of Appeals per Mr. Justice LACOMBE, says:

"In all these cases the amounts paid in settlement were unliquidated, since but for the finding of the

board, the Government could have litigated them all in good faith, and in giving up resort to the court, at the same time going to the expense of constituting a special tribunal to adjust the claims, and securing the more expeditious payment of what might be found due, there was certainly abundant consideration to sustain the settlements." *(Record, p. 526)*

But there certainly was in these cases the element which the appellate court seemed to consider established a want of consideration in the settlement in this case—viz., the payment of only the amount admitted by the Government to be due—so that the Government paid only the amount which it admitted it was obligated to pay, and the claimant received nothing more for his disputed claims.

The case of *United States vs. Child (12 Wallace, 232)* was an appeal from the Court of Claims *(Child vs. United States, 4 Court Claims, R. 185)*. In that case, in the Court of Claims, Child & Co. were plaintiffs, claimants against the United States for the sum of $163,000, claimed as a balance due them on a sale of military stores to the Government. It appeared that the chief quartermaster of the Department of the West had purchased from the claimants, military stores for the United States, the fair value of which was, *as the Court of Claims found*, *$478,119.62*, the price charged by the claimants, for which vouchers were given by the quartermaster. Payment of the vouchers was suspended by the War Department pending an investigation, and a military commission was appointed to investigate the claim, with others. The claimants' books and papers, vouchers, &c., were seized and produced before the commission. As the Court of Claims said:

"The commission examined them all, and at the conclusion of its investigations endorsed upon the vouchers the amount allowed by it, and ordered that the sum of $163,111 be deducted from the vouchers. The commission also withheld all of the vouchers until the claimants signed a receipt or agreement, *not under seal and without consideration*," (as the Court of Claims

held), 'which provided that, when the reduced amounts allowed by the commission should be paid, the payment should be in full of all the claimants' demands against the United States.'"

The Court of Claims further found that

"the claimants at the time of receiving payment made no formal objection or protest, but were required to and did sign a receipt, *not under seal and without consideration*, whereby they acknowledged having received such reduced amounts, *in full of the above account.*"

The Court of Claims also held, as matter of law:

"that the agreement or receipt, signed by the claimants on receiving back their vouchers, was obtained and exacted by duress of their goods, *and was wholly without consideration and void;*" and further: "That the receipts required by the quartermaster at the time of payment, expressing upon their face that a less sum was received than that due, *and being without consideration*, did not operate as a release of the balance of the claimants' accounts and were wholly void."

As to the matter of consideration, the United States Supreme Court, upon appeal from this decision *(12 Wall., 243, per Miller, J.)* said: "Although it is found "by the court that these receipts were not under "seal and were without consideration, **the latter "statement must have some meaning not "apparent to us, in view of the other fact "found also, that over $315,000 was paid "to the claimants on those accounts at the "time they gave the receipts."**

That is, in effect, saying that the amount paid on signing the receipt, was a sufficient consideration for the release of the rest of their claims.

But, it is submitted that, when the commission appointed by the Government had reported as to the amount which should be allowed on the claimant's demand, and the amount to pay it had been appropriated, the demand was liquidated at that amount; the

Government could not "in good conscience" refuse to pay it; nor could it have any "defense that could be urged in good faith or with color of right" against its immediate payment, or to any action which might be brought to recover it.

In an earlier case, *(United States vs. Adams, 7 Wallace, 463)*, a similar ruling was made by the U. S. Supreme Court. The claimant, Adams, presented certain claims against the Government; one for $83,500 for a *balance* due, for building certain mortar boats according to a specific contract; and another for $25,400, a balance claimed to be due, for building tugboats for the Government under a contract. A commission appointed to investigate the claims allowed $75,959.24 to be due upon the first claim, and $20,196 on the second; and gave *vouchers* therefor, which the Government paid, and for which the claimant gave a receipt in full of all demands, *which he signed under protest. (7 Wall., 466)*.

The Court of Claims held that Adams was entitled to recover the whole of the contract price, for which judgment was given. But the U. S. Supreme Court held that the claimant could not afterwards recover for the balance of the contract price, *(7 Wall., 467)*: that the acceptance of the payment of the amount of the voucher was a bar to any further demand against the Government, *(pp. 479-481, &c.)*; and that this was so, independently of the signing of the receipt in full; that *it was the acceptance of the money payment which constituted the accord and satisfaction.*

The doctrine of this case was affirmed by the Supreme Court in the *Child case (12 Wallace, 232)*, where it was held, that in neither case was the voluntary submission of the claim against the government to the commission appointed to investigate such claims, essential to bar a recovery. "*The bar in both cases* "*rested upon the voluntary acceptance by the claimants* "*of a smaller sum than their claim as a full satisfaction* "*of the whole, and acknowledging this in a receipt for* "*the amount paid.*"

The Court said: "We lay out of view in this case, "as in the Adams case, the receipts which they gave "under protest, in order to regain possession of their "vouchers. But we cannot disregard the finding of "the Court, that, after Congress had appropriated the "sums found due by the commissioners * * * the "claimants received the amount so allowed, and signed "upon each voucher a receipt whereby they acknowl- "edge having received said reduced amount '*in full* "*of the above account.*'" *(12 Wall., 243)*

And the Court also said: "It is of no avail to urge "that the Court of Claims has found that the whole "claim was just and ought to be paid. After the com- "promise that question was no longer open to in- "quiry. *It is the very essence of such adjustments of* "*disputed rights that the contest shall be closed.*" *(12 Wall., 245)*

Both of these cases were again approved by the Supreme Court, in *United States vs. Justice (14 Wall, 535)*, where it was held that where a contractor with the United States and the Government disagree as to what is justly due to the contractor, and the question is referred by the War Department to a commission to audit such claims, and the commission finds a certain sum as justly due, and the contractor receives that sum, he cannot sustain a claim for a further sum, *even though he give no receipt in full, or at all.*

The original claim was a liquidated sum for the sale of guns at a contract price; but the amount due was said to be unliquidated because of claimed offsets.

The Court said *(14 Wall, 547)*: "After waiting "until the five years' limitation to actions of this kind "had nearly expired, he brings this suit to recover the "balance of the claim, according to the original con- "tract price; and the question is, can he maintain "it?" After referring to the fact that the claimant took the sum found to be due him without protest, or "an intimation of dissatisfation," the Court said, "*he* "*cannot afterwards be heard to say that he did not ac-* "*cept this in full satisfaction of his demand.*" "It is "difficult to suppose that at this time he had any other "purpose than to acquiesce in the decision which was "made. *If his purpose were different, why the long* "*delay in instituting suit?* It is hard to believe that "the course subsequently taken *was not the result of* "*an afterthought.*"

All of which is exceedingly applicable to the facts of the present case; where Clark waited for nearly five years and a half, after receiving and acknowledging payment in full satisfaction of all demands, before beginning any suit, or apparently making any claims against the Railway Company.

In all of these cases the amount paid was only the amount admitted to be due by the Government. It paid nothing but what it was admitted it was obligated to pay; and the claimant received nothing for the release of the balance of his claim except the payment of what the Government admitted to be due; which payment under similar conditions the appellate court in the present case held not to be a consideration for such release.

The same rule must be applicable to the one case as to the others.

See, also, *United States vs. Clyde, 13 Wall., 35*, and *Mason vs. United States, 17 Wall., 73*, in which the Court says of a similar settlement that "it is a plain case of voluntary settlement between the parties, *which all Courts hold is final and conclusive.*"

In *Boffinger vs. Tuyes, 120 U. S., 198*, it was held that the payment after an adverse decree in the Appellate Court, of an agreed sum in compromise and settlement of his liability by a surety on an appeal bond, and a written receipt stating that the money is paid "*in full satisfaction of the decree*" rendered against the surety, constitutes an accord and satisfaction. In this case the amount due was doubly liquidated, not by any mere act or acknowledgment of the parties, but by judicial decree affirmed on appeal; matter of record of the highest character; and yet it was held that an accord and satisfaction could be predicated of the payment of an agreed sum in compromise and settlement of the liability.

The rule is the same in the Circuit Courts of the United States.

The Cayuga, 59 F. R., 483 (Circuit Court of Appeals,

6th Circuit, Dec., 1893), and in *Battle vs. McArthur, 49 F. R., 715*, it was held that,

"even though a person does not receive all that is legally due to him, yet, where the *sum actually due is in dispute*, the avoidance of litigation is a sufficient consideration to support a settlement fairly made with full knowledge of all the facts."

And, as the Supreme Court said in *Union Bank of Georgetown vs. Geary (30 U. S. [5 Peters], 114)*,

"to permit a subsequent judicial decision on this point in their favor as having a retrospective effect so as to annul a settlement or agreement made by them under a different state of things, would be sanctioning a most mischievous principle."

As Lord HARDWICKE remarked in *Stapleton vs. Stapleton (1 Atkyns, p. 12)*, following a previous decision of Lord MACCLESFIELD:

"An agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreements of the parties, for the right must always be on the one side or the other, and, therefore, the compromise of a doubtful right is a sufficient consideration of an agreement."

And in *Chitty on Contracts (11th Ed), Note 1, p. 46*, it is said:

"The real consideration which each party receives under the compromise, being, not the sacrifice of the right, but the settlement of the dispute, and the abandonment of the claim, it is no objection to the validity of the transaction that the right was really in one of the parties only, and that the other had no right whatever."

There was clearly an ambiguity in the contract in respect to the use of nut locks in the construction of the road, as appears by the contract itself, and also by the statements of the Referee.

Ambiguity in an instrument not only furnishes ground for an honest dispute, but such dispute precludes the application of the rule that the payment by a debtor of a part of his liquidated debt is not a satisfaction of the whole.

Tuttle vs. Tuttle, 12 Metc. (53 Mass.), 557.
Storch vs. Dewey, 46 Pac. Rept., 698.

The allowance of an item or charge in an account through a mistake of law is as binding upon the party making it as is the voluntary payment of money under a mistake of law.

Elliott vs. Swartwout, 10 Peters, 137.
R. R. Co. vs. Soutter, 13 Wallace, 517, 524.
Bank vs. Daniel, 12 Peters, 32.
Birkhauser vs. Schmitt, 45 Wisconsin, 316.
Goodrich vs. Sanderson, 35 Apple. Divn., 546 (N. Y. Supreme Court, First Dept., 1898).

Clark certainly at the time of giving the acknowledgment of March 9, 1888, supposed that he was legally liable for the forfeiture, which legal liability he recognized and admitted by the instrument itself. To say that now, ten years afterwards, it has been adjudged and determined by the decision of the Referee and the Court that he was not, in law, so liable, only establishes that he made the allowance, which was equivalent to an acceptance of payment, under a mistake as to his legal right, which was then uncertain and in dispute. So, also, his legal right or liability in regard to the nut-locks was uncertain; and he admitted it, if, as it is now held, he was not chargeable for them, under a mistake of law as to his liability.

The Circuit Court of Appeals, it is submitted, applied the wrong rule in this case, and instead of seeking to find some ground to sustain the settlement made by the parties themselves years ago, and acquiesced in for so long a time before suit was brought, seems rather to have sought to find a want of consideration in order to overthrow it. As was said by LYON, J., in *Hoyt vs. McLaughlin (52 Wis., 283)*:

"The law favors settlements, and will not open or disturb them but for very cogent reasons."

And Chief-Justice MARSHALL, in *Chappedelaine vs. Dechenaux (4 Cranch., 309)*, said :

"No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony."

Harley vs. 11th Ward Bank, 76 N. Y., 618.
Kingsley vs. Melcher, 56 Hun, 547.

In *Kellogg vs. Richards (14 Wend.* [*N. Y.*], *119)* NELSON, J. (afterwards Justice of the U. S. Supreme Court), said :

"The rule that the payment of a less sum of money, though agreed by the plaintiff to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, *is technical, and not very well supported by reason.* Courts, therefore, have departed from it on slight distinctions."

Couldery vs. Bartrum, 19 Ch. Div., 394, states the same rule in England.

POTTER, J., in *Jaffray vs. Davis, 124 N.Y. 169* (1891), said that, while ruling that the acceptance of a smaller sum in payment of an admitted liquidated debt was not a satisfaction, courts

"*have rarely failed* upon any recurrence of the question, *to criticise and condemn its reasonableness, justice, fairness or honesty.*"

and in *Henson vs. Stever, 69 Mo. Applt. Rept., 136, 141*, ELLISON, J., said :

"Courts regard the rule preventing a creditor from making a valid contract to take a less sum of his debtor in discharge of a greater *as technical and unreasonable*, and they are eager to find some element in the transaction which can be held to be a consideration."

Applying these reasonable and equitable rules and

principles to the facts of this case, the Court should not find it difficult to sustain the settlement voluntarily, made between the parties, nor to find an ample consideration, not only in the unliquidated character of the plaintiff's claim as to the amount actually due to him, but in the allowance to him of the $34,598.90 for matters not fixed by the chief engineer's certificate.

The rule in the State of New York is the same. An early case, very similar to the present, is that of *Davenport vs. Wheeler, 7 Cowen, 231* (N. Y. Supreme Court, 1827), where the Court said :

" The defendants had stated an account and drawn a check for the balance, which the plaintiffs had accepted upon the footing of a balance stated, with the particulars in their possession, without objection for several months." " One offers and the other accepts a certain sum as the true balance. * * * It was paid and received as in full. To avoid this consequence the check should have been rejected ; or at least, notice given that it had been received only in part payment. The debt was unliquidated in its nature. But, by the acts of the parties, it was liquidated and paid. They ought not afterwards to be allowed to go into evidence upon it. The defendants had concluded themselves clearly by their accepted offer of compromise. The plaintiffs ought to be equally concluded. * * * After such a long silence especially " [which in this case was only a few months] " they should not be allowed to open the account."

It was held that the parties were by the transaction concluded as to the amount of the goods ; that it was equivalent to an *insimul computassent.*

In *The People vs. Board of Managers, &c. (96 N. Y., 640)*, plaintiff, who had certain claims for salary and services, &c., against the Buffalo Asylum which were adjusted and paid, gave a receipt which read : " I " hereby acknowledge this to be a receipt *in full of all* " *demands of every name and nature* which I have " against the asylum." He afterwards sued to recover damages for being discharged without cause, claiming that his hiring was for a longer term, *and also for certain extra work.* The Court said : " The instrument

" referred to, upon its face, shows that it was intended " to cover all claims and demands against the re- " spondent, and *prima facie* it is sufficient to discharge " such claims absolutely."

" The doctrine that the settlement of a debt for a less sum after a specific debt is due, in satisfaction of the debt, is not good by way of an accord and satisfaction, is only applicable where the existence of the debt, *and the amount thereof, is conceded*, and does not apply where the claim is disputed."

In *Green vs. Rochester Mfg. Co.* (1 N. Y. Supreme Ct., p. 6) the Court said : " The rule that the payment of " a less sum in satisfaction of a specific debt after the " debt is due does not extinguish the balance, has no " application to a case where *the amount claimed* by the " creditor is unliquidated and in dispute. In the latter " case, when a sum is offered and accepted in discharge " of all legal claim, and a receipt in full is demanded " and given, *the entire claim is discharged, though it* " *may be shown by the evidence that the creditor would* " *have been entitled to recover more than the amount he* " *received.*"

Citing *Palmerton vs. Huxford* (4 Denio, 166), and *Wilkinson vs. Byers* (1 Adol. & El., 106).

In *Looby vs. West Troy* (24 Hun, 78) the plaintiff's claim was upon a contract to furnish oil, &c., for the public lamps at a *certain fixed rate ;* which would seem to have made it a liquidated claim. The plaintiff sought to recover under the contract. The defendant offered to pay part of the amount claimed, and delivered to plaintiff a warrant to his order, expressed to be in full satisfaction, upon which he received payment, without giving any other receipt, and *stating that he would not accept it as payment.* It was nevertheless held to be a discharge and a bar to the recovery of the balance of his claim.

" Where a debtor offers a certain sum of money in full satisfaction of an unliquidated demand, and the creditor accepts and retains the money, *his claim is cancelled ; and no protest, declaration or denial on his part*, so long as the condition is insisted upon by the debtor, *can vary the result.*"

Fuller vs. Kemp, 138 N. Y., 231.

The Court further said in this case :

" It is of no significance that the remittance was by check. Both parties treated it as money, and the plaintiff had but a single alternative presented for his action, *the prompt restoration of the money to his debtor, or the complete extinguishment of the debt by its retention.*" (138 N. Y., 237)

" *The acceptance of the money involved the acceptance of the condition upon which it was paid, and the law will not permit any other inference to be drawn from the transaction.* Under such circumstances the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest can affect the legal quality of his act."

" Where the debt is unliquidated and there is a *bona fide* disagreement *in regard to the extent of the debtor's liability*, the law will not permit the creditor to accept and retain money which has been tendered by way of compromise, and then successfully litigate with his debtor for the recovery of a greater sum."

Citing :

Hill vs. Sommer, 53 Hun, 392.
Preston vs. Grant, 34 Vt., 201.
Boston Rubber Co. vs. P. W. Co., 58 Vt., 551.

In *Hills vs. Sommer, 53 How., 392, 494 (N. Y. Supreme Court, 1889)*, the claim was to recover an agreed price upon a sale of merchandise. Defendant claimed a rebate because of defective quality, and sent plaintiff a draft for only the amount admitted to be due ; *held*, an accord and satisfaction.

Where a debtor sent to his creditor a check for a certain amount, in full of the amount which the debtor claimed was due to his creditor, although the creditor refused to accept the check in full payment, and claimed that more was due ; *held*, that, although the amount due might be larger than the amount of the check, yet that the creditor, by accepting and using the check, accepted it in full payment of the claim in dispute.

Reynolds vs. Lumber Co., 85 Hun, 470.

See, also,

Wahl vs. Barnum, 116 N. Y., 96.
Zoebish vs. Von Minden, 120 N. Y., 407.

In a recent and prominent case in the New York Court of Appeals, which is quite emphatic and conclusive as to the rule in that State *(Nassoiy vs. Tomlinson, 148 N. Y., 326, 1896)*, it was said: "*A demand is not liquidated even if it appears that something is due, unless it appears how much is due;*" and where it was admitted that one of two specific sums was due, and there was a genuine dispute as to which was the proper amount the demand is to be regarded as unliquidated.

"If, when the amount of an indebtedness is in dispute the debtor sends the creditor a check for the sum *conceded by the debtor to be due*, with an unsigned receipt '*in full*' and a letter requesting the signing and return of the voucher, *the offer of payment is to be deemed made upon the condition of its acceptance in satisfaction of the debt;* and, if the creditor retains the papers, and * * * endorses and collects the check, such acceptance of the check imports an election to be bound by the condition on which it was offered, *and constitutes an accord and satisfaction*, which will not be affected by the creditor's subsequently sending the debtor a receipt on account, unless such receipt is acquiesced in by the debtor."
(148 N. Y., 326.)

"As reflecting the intention of the parties, it is the same in effect as if the check had been written '*in full*,' as was the case in *Reynolds vs. Empire Lumber Co. (85 Hun, 170)*."

In *Nassoiy vs. Tomlinson (148 N. Y., 331)* the Court further said:

"The plaintiff cannot be permitted to assert that he did not understand that a sum of money offered in full was not, when accepted, a payment in full. As was said in *Hills vs. Sommer* (53 Hun, 392-4), he was 'bound either to reject' the check 'or, by accepting it, to accede to the defendant's terms.' The money tendered belonged to them, and they had the right to say on what condition it should be received. 'Always the manner of the tender and of the payment 'shall be directed by him that maketh the tender

'or payment, and not by him that accepteth it.' *(Pinnel's Case, 5 Co., 117)* The plaintiff could only accept the money as it was offered, which was in satisfaction of his demand. He could not accept the benefit and reject the condition, for, if he accepted it at all, it was *cum onere*. When he endorsed and collected the check referred to in the letter asking him to sign the enclosed receipt in full, *it was the same, in legal effect, as if he had signed and returned the receipt*, because acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered. *The use of the check was ipso facto an acceptance of the condition.* The minds of the parties then met so as to constitute an accord, and, as was said by this Court in *Fuller vs. Kemp* (138 N. Y., 231), '*the acceptance of the money involved the acceptance of the condition, and the law will not permit any other inference from the transaction.*' "

In *Nassoiy vs. Tomlinson* the defendant paid only the amount which he admitted to be due in any event, and the creditor got only what he was entitled to anyhow, and not all which the Court afterwards determined was his due. It was a question of commissions. There was no dispute but that the plaintiff was entitled to commissions at, at least, the rate of one per cent., which was all that was paid. That was conceded to be due by the defendant, and that amount he paid, insisting that plaintiff must take it in full, which he refused to do. The Court or jury found that he was entitled to five per cent., the larger sum ; but, as the Court of Appeals said : " A demand is not liquidated, even if it appears that something is due, unless it appears *how much* is due."

A still more recent and more positive decision to the same effect, of the Appellate Division of the New York Supreme Court (First Department, Dec., 1898), has just been announced *(Goodrich vs. Sanderson, 35 App. Div., 546-562)*. Goodrich, as Receiver of the Union Warehouse Co., lessors to Sanderson of certain piers and dock property, brought suit against Sanderson to recover $3,103.32 balance claimed to be due for rent for the

month of July, 1894, the month's rent being fixed by the lease at $4,375, which made it a liquidated sum. Sanderson claimed certain deductions or offsets to the amount of $3,103.32 for repairs and being disturbed in his possession by certain work done in rebuilding by the lessors, &c. An account was stated between the parties, by which Sanderson was charged, "July 1, to rent of piers, Prentice Stores, month ending 31st inst., *as per lease*, $4,375," and was credited by, "Less deductions as agreed"—various items amounting to $3,103.32, leaving a balance of $1,271.68, for which a check was given by Sanderson and accepted by Goodrich as a payment in full. He gave no formal receipt, or did anything except sign his name as Receiver to the memorandam or statement of account. The company of which Goodrich was Receiver was itself lessee of the property from the Prentice estate, Sanderson being a sublessee, the leases containing similar covenants. Goodrich claimed the same deductions from the principal lessors on the rent for July as he had allowed to Sanderson, which they refused to make, and brought suit for the full amount of the rent, which they recovered, the Court holding that there was no valid claim for the deduction by either the Receiver or Sanderson. The Receiver, Goodrich, thereupon brought suit against Sanderson to recover the amount he had allowed in the settlement with Sanderson.

The suit was tried before a Referee in the State Court, who gave judgment for the defendant Sanderson, which was affirmed by the appellate court "on the opinion of the referee" which is printed as the opinion of the Court. *(35 Applt. Div., 547, 561)*

The Referee referred to the case of *Fuller vs. Kemp, 138 N. Y., 231;* and also to *Kellogg vs. Richards, 14 Wend., 116*, as holding that the fact that the payment was made by a negotiable instrument bearing endorsement would afford a consideration.

Among other things, the Referee in his opinion said:

"I am not satisfied whether the defendants had at any time a valid offset or counterclaim against the rent due under the lease for the interruption of their possession. They clearly had none under the covenant for quiet possession. * * *

"I am, however, satisfied that in negotiating for a settlement, the defendnts pressed their claim in good faith, and that it was conceded as a valid claim by the plaintiff in equally good faith, and the amount adjusted by the negotiation, the result of which both parties accepted.

"The receipt by the plaintiff of the defendants' check for the balance agreed upon as due, taken in connection with the statement of account which he signed, proves the meeting of the minds of the parties. *(p. 552)*

"It is further argued that the Sanderson's claim was admitted in full, and, therefore, that there was no dispute and no compromise, and that it follows that there was no accord" *(p. 553)*.

"Nor can I agree with the contention that there is no accord unless there is a compromise. I do not find any case so holding. It seems to me that the case of *Nassoiy vs. Tomlinson (148 N. Y., 326)* is inconsistent with such a proposition.

"It is obvious that there had been no compromise on the part of the delefendant. He had paid the exact amount admitted by him to be due.

"The plaintiff further urges that an offset is not the equivalent of a payment, and cites *Renard vs. Fiedler (3 Duer, 318)*. I do not think that that case draws any distinction between an erroneous payment of money and erroneous allowance of deduction.

"The weight of authority seems to be in favor of the proposition that a valid accord and satisfaction may be founded upon an untenable claim. *(Union Bank of Georgetown vs. Geary*, 5 Pet., 99, 114; *Pitkin vs. Noyes*, 48 N. H., 294; *Fisher vs. May's Heirs*, 2 Bibb [Ky.], 449; *35 Appl. Divn., 554-556)*

A similar ruling was made in *L'Estienne vs. Ernst (5 App. Divn., 373)* by the same Court (1896). See, also, *Lumber Co. vs. Brown (68 Vermont, 239); McDaniel vs. Lapham (21 Vt., 222); Preston vs. Grant (34 Vt., 201); Towsley vs. Healy (39 Vt., 522); Donahue vs.*

Woodbury (6 Cush. [Mass.], *148); Bull vs. Bull (43 Conn., 455); Palmer- ton vs. Huxford (4 Denio, 164),* and *Tanner vs. Merrill (65 N. W. R., 564).*

If the amount due to Clark by the railway company was liquidated, it was so liquidated at the sum of $213,532.49; since, as the Circuit Court of Appeals states, there was nothing to show that the statement of account and acknowledgment of satisfaction "fails in any way to *set forth accurately the agreement* entered into between the parties on that day."

If so, the amount then due by the company to Clark was liquidated by the agreement of the parties at $213,532.49; which was the amount which was paid.

If it was not liquidated at that sum then the amount due was not liquidated at all. Indeed, the plaintiff Clark claimed that the amount due to him was entirely unliquidated; since he claimed and sued to recover some $300,000 more as still due to him, notwithstanding the certificate and estimate of the Chief-Engineer, and in addition to the further sum of $34,598.90 which was allowed to him by the Railway Co. upon the settlement.

It is, we think, indisputable, that no one of the cases cited in the opinions of either of the Judges of the Circuit Court of Appeals, holds that a claim or demand is a liquidated one, where one side only of an account of mutual transactions and charges or credits is agreed upon and undisputed, if the amount of the offsets or charges on the other side, or any items of them, are in dispute; or where the balance due upon the whole account is in dispute and unliquidated, as it was in this case, unless it was liquidated at the sum stated in the account to be due at that time; or that the payment of the balance of an account found and determined by the mutual agreement of the parties themselves to be due upon a statement of claims of charges and credits upon either side by mutual concessions and allowances, is not a sufficient consideration to support

the settlement thus arrived at, although it afterwards be adjudged after a long litigation, instituted many years afterwards, that as to some of the items on one side of the account the party charged with them was not legally liable for them.

That is the status as to the facts of this case.

Decision as to Nut-Locks.

In the Referee's decision, after stating that there was no specific reference to nut-locks in the contract, he said:

"Soon after the contract began the defendant made a shipment of nut-locks to William W. Hegeman, who, as agent for the plaintiff, had control of the work done for Clark in building the road, for use in constructing the track, with a bill charging the amount of the shipment to Clark as paid by the company for Clark. Upon this *a controversy arose*, Hegeman denying for Clark that he was bound to supply nut-locks in building the road and the company insisting that he was.

"By common consent this question was adjourned for the time being and the road was built with nut-locks, which were from time to time received, placed in the track and credited upon the books of Clark by Hegeman to the company, but with the understanding that the claim of the defendant was not thereby admitted, but that its ultimate decision was postponed until after the completion of the work."

(Record, p. 62, fols. 184, 185.)

After again alluding to the fact that nut-locks do not come under any of the provisions of the contract, the Referee further said:

"The probability seems to me to be that in preparing this contract the subject was overlooked or forgotten by the chief engineer, but that, when the contract came to be executed, Kimball, the manager or superintendent of construction for the company, seeing the importance of their use, insisted upon their insertion in the contract, *whereupon a dispute arose*,

and it was agreed that they should be supplied by the company, and, in fact, used, the question between the parties as to who should pay for them being left in abeyance until the completion and construction of the road."

(Record, pp. 66, 67, fols. 198, 199.)

And also :

"So far the nut-locks are concerned, it is clear to me that they had been skipped or omitted, probably forgotten in the preparation of the original contract."

(Record, p. 81, fol. 242.)

The Referee further said that "the testimony in the case would leave the mind in doubt whether it was originally intended to require the payment for the nut-locks by the contractor or not," and that there was much conflict in the testimony, but that, considering the sixth section of the contract itself as controlling, he found there was no provision in it requiring Clark to furnish the nut-locks *(p. 71, fols. 212-13).*

The question of Clark's liability for the nut-locks was certainly a legitimate matter for dispute in good faith.

As to the $40,000 Forfeiture.

In the Referee's decision in regard to this matter, he stated :

"By the terms of the contract as modified before execution and noted in the testatum clause, the amount of money to be paid for the work to be done by Clark was $3,954,600. The defendant claims that by a supplemental agreement entered into between them, this provision was modified, so that if the railroad were not completed by the first of June, 1887, the forfeiture of a deduction of $40,000 from the contract price should be imposed upon the plaintiff; or, in other words, *that the contract price should be reduced by the sum of $40,000.*"

"The existence of any such supplemental contract is denied, but after much consideration of the testi-

mony on both sides, I believe the defendant to have established this proposition, and that there was such an agreement, under which the road was built, and that it was supported by a valuable consideration," *(Record, p. 71, 72; fols. 213, 214)*; and that it was in its essential nature liquidated damages, as it was intended to be. *(p. 81, fol. 243)*

In the Referee's formal findings the facts in regard to this supplemental agreement for the forfeiture and the explanation and reason of it were stated to be that when the contract was originally executed on behalf of the railway company by Roswell Miller, its then general manager at Milwaukee, the consideration expressed in it to be paid by the railway company was $3,914,600, or $40,000 less than the amount afterwards stated, which change was made when it was executed by Clark in New York, Mr. Miller, who executed it for the company, not being present; that when his attention was called to it he informed Mr. Clark that there was a misunderstanding in regard to the consideration; that the amount should be $3,914,600 if the date for the completion of the work was to be August 1, 1887, as stated in the contract, instead of June 1, 1887, as originally agreed upon; and thereupon, Clark agreed with the company that he would forfeit $40,000 if the road was not completed by June 1, 1887, instead of August 1, 1887, the date stated in the contract; and that the work was not commenced until that agreement was made.

(Record, p. 120, 121; fol. 359-362.)

Thus the true consideration which had originally been agreed upon, of $3,914,600, was changed to one of $3,954,600, with an agreed forfeiture of $40,000 if the work was not completed by June 1, 1887, instead of August 1, 1887.

The Referee further found that a certain crossing of the railroad built under the contract, with the line of the Hannibal and St. Joseph R. R. Co., at a place

called Minnaville, had not been procured or arranged for prior to October 27, 1887, and that the railroad could not, therefore, have been completed by the plaintiff Clark by June first, 1887; and as to this, he said:

"However blameworthy he may have been for other delays, he is not responsible in law for not having built this crossing sooner, and therefore not liable to the forfeiture of $40,000 for not completing the road in June."

(Record, p. 75, fol. 224.)

The road, however, was not fully completed or accepted by the company until March, 1888.

As to the Receipt or Acknowledgment of March 9, 1888.

In regard to this, the Referee in his decision said:

"This receipt was sent to Clark by Vice-President Bond with the information that upon its signature and return to him, a check would be delivered to Clark for the sum of $173,532.49. Clark signed the receipt, and at a later hour during the day received a check, and thus, as far as he could legally bind himself for the consideration recited in this paper, Mr. Clark accepted the sum of $173,532.49 as in full, except as to the sum of $40,000 reserved to meet his guarantee recited in the receipt, and as far as his agreement and signature could give it force, agreed, and accepted these amounts as establishing, that he had no claim for nut locks, and had credited the company with $40,000 because of the non-completion of the railroad by the first of June, 1887."

(Record, p. 80, fols. 238, 239.)

He also said:

"I dismiss as of no value in this consideration the claims that Clark signed this receipt improvidently and without due consideration. He is bound by it, so far as he could legally bind himself from retraction, quite

as much as if he had taken days for its consideration, been advised by counsel, and was under no pecuniary stress pressing to accept a smaller sum than was due."
(Record, p. 80, fol. 240.)

And as the Circuit Court of Appeals said, per Mr. Justice LACOMBE, there was nothing in the findings to show "*that it fails in any way to set forth accurately the agreement entered into between the parties.*"
(Record, p. 518.)

By the decision of the Circuit Court of Appeals, that there was no consideration for the agreement, evidenced by the acknowledgment of satisfaction of March 9, 1888, executed and delivered by Clark, because the railway company paid to Clark only the amount which it admitted to be due to him in any event, after deducting the disputed items which it had charged against him, it held, in effect, that although the two items of charges for nut-locks and time forfeiture were in dispute and were, therefore, unliquidated, and although they were embraced in the settlement, there was no consideration to Clark for waiving or releasing them, in the payment of $173,532.49, for the reason that that amount was due to him anyway; and that, therefore, he received no additional consideration for the release of those claims; and that the railway company parted with nothing which it was not obligated to pay.

The Court held that the certificate or final estimate of the chief engineer of the railway company, fixing the amount which Clark had earned for all work done by him under the contract, including all extra work, less work which he did not perform, at $3,895,798.79, liquidated the amount which was due him at that sum; and that there was nothing to show that the sum of $34,598.90, which was credited to him in the statement of account which preceded and was included in and made a part of the acknowledgment, "for materials

sold by him to said company, certain rebates and other matters of that description," had not already been agreed upon and liquidated by the parties, making the total amount at which the plaintiff Clark's claim was liquidated to be $3,930,397.69.

But there is no finding of fact that that sum of $34,598.90 had been so liquidated by the parties prior to the execution of the agreement of October 9, 1888, by any formal or binding agreement between them, or otherwise than by the statement of it as a credit to Clark in the account and acknowledgment itself, as part of the general settlement.

If the statement of account and acknowledgment itself liquidated the whole amount with which Clark was entitled to be credited at $3,930,397.69, it also necessarily liquidated the amount with which he was chargeable at $3,716,865.20, including the amount of the charge for nut locks, $9,558.63, and the $40,000 forfeiture, and likewise liquidated the balance which was then due to him at the sum of $213,532.49, of which $173,532.49 was then paid to him in cash, and the $40,000 reserved to meet certain claims which was afterwards paid out, and more too, as found by the Referee and the Court.

(Record, p. 116, fol. 346, p. 136, fol. 406.)

In the opinion of Mr. Justice LACOMBE, in the Circuit Court of Appeals, it is said in regard to the sum of $34,598.90, which was credited to Clark for materials sold by him to the company, &c., in the statement of account forming part of the acknowledgment of March 9, 1888, which was not included in the Chief-Engineer's estimate as for any part of the work done by Clark under the contract as follows:

"This sum is by the statement of account set forth in such receipt credited to Clark, and is included in the $173,532.40 paid to him upon his signing such receipt. From what has been said before, it is plain that, if at the time of the transactions relied upon as showing an accord and satisfaction this sum of $34,598.90 so

allowed to Clark represented an unliquidated item, the amount of which he would have to establish by evidence in case he had sued to recover it, its allowance to him upon the settlement of March 9, 1888, would be a sufficient consideration to uphold that settlement against him as an accord and satisfaction of all his claims."

(Record, p. 532.)

"From the Engineer's certificate, which is included in the findings, it appears that this item represented no part of the work specified under the contract, and no part of the extra work and materials ordered by him; that it was not included in his certificate, nor in the final estimate, that he made no decision about it one way or the other, and apparently that he never undertook to pass upon it. *Therefore it was not liquidated by the original contract, nor by any action of the Chief Engineer thereunder.* Indeed, it is plain to a demonstration from the findings, that the item in question was not included either in the original contract or in the extra work, and must represent an additional and independent contract of sale. What the terms of that contract of sale were, the findings do not disclose; if they were of such a character as to leave the price of the articles sold open to future adjustment, and if no binding agreement of the parties had subsequently adjusted such price; in other words, if, on March 9, 1888, the situation was such that the plaintiff, put to his suit, could have recovered this item only by proof of amount furnished or of reasonable value, or of both, then it was an unliquidated item, and its allowance to the plaintiff on the settlement would be a good consideration to support the contract of accord and satisfaction."

(Record, pp. 532, 533.)

There is no finding whatever that said amount of $34,598.90 had ever been agreed upon or liquidated by the parties by any formal agreement between them which would entitle the plaintiff Clark to recover that amount from the railway company, as an independent item, or "in such a way as to preclude further litigation in good faith, or with any color of right," or otherwise than "by some mere expression of willing-

ness to pay that particular amount," or otherwise than by the statement of it in the account preceding and which formed a part of the receipt and acknowledgment of satisfaction; nor that the Company would have allowed that credit to Clark except as an item in the account in which he should likewise allow credit to the R. R. Co. for the amount of the charge for the nut locks and forfeiture.

The learned Judge, however, seems to hold that because of the finding of the Referee

"that said receipt and paper contained an accurate, truthful and *undisputed* account of all dealings between said parties, except in the matter of the $40,000 deducted for time forfeiture and the $9,558.63 for nut-locks," he must assume that the Referee was "satisfied from the testimony that the prior transactions between the parties were such that this sum was no more open to dispute than was the sum of $3,895,798.79 to which the Chief Engineer had certified. By what process it was so liquidated does not appear in the findings."
(Record, p. 533.)

The decision of the Court is, therefore, apparently made to turn and depend upon inferences drawn from the use of a single word in the Referee's findings, viz.: that the account stated in the receipt or acknowledgment was "undisputed," except as to two items.

The learned Justice thereupon concludes that he must, therefore, "*assume* that either by agreeing for a price in advance, or subsequently, by entering into some binding agreement as to the sum to be paid," the Co. had lost its right to throw the plaintiff into court as to that item, and that its allowance and payment, therefore, could not constitute a good consideration for the alleged accord and satisfaction."
(Record, p. 534.)

It would, therefore, appear that the Court was obliged *to assume* that there had been a previous binding agreement between the parties as to this matter, which neither party could question, in order to make

out a liquidated claim in favor of Clark for this sum of $34,598.90; when, as a matter of fact, there are, it is submitted, no findings of fact to sustain any such assumption or conclusion; and it is only by *assuming* that the Referee was satisfied in regard to certain matters which were necessary to be found to exist in order to make the plaintiff's claim a liquidated one, concerning which there is no finding of fact whatever, that the claim could be considered to be liquidated, independently by itself, or otherwise than as part of a general settlement.

On the contrary, it is respectfully submitted that there were findings, both of fact and of law, made by the Referee which are not referred to by the learned Justice, and which have apparently been overlooked, which negative the assumption that the item of $34,598.90 had been agreed upon or settled by or between the parties prior to the statement of account contained in the instrument of March 9, 1888.

The Referee made the following findings, which are not mentioned or referred to in either of the opinions of the Honorable Judges of the Circuit Court of Appeals:

"16. That no other final settlement of the accounts under said contract had been had between the plaintiff and the defendant at the time that the said last-mentioned paper was signed and delivered."

(Record, p. 116, fol. 347.)

"18. That no account was ever, otherwise than by said paper and the receipt of said money, stated of the transactions under and connected with said contract between the plaintiff and the defendant."

(Record, p. 117, fol. 349.)

And conclusion of law No. 9:

"That no account of the transactions under this contract, *and of the claims sued on in this action*, was ever had or stated between the parties to this action otherwise than by said receipt or paper of March 9, 1888."

(Record, p. 119, fol. 356.)

It is quite apparent, therefore, that if no other final settlement of the accounts under the contract had been had between the parties at the time the acknowledgment of March 9, 1888, was signed and delivered, and no account was ever otherwise than by said paper and the receipt of said moneys stated of the transactions under *and connected with said contract*, and no other account of the transactions under the contract, *and of the claims sued on in this action*, was ever had or stated between the parties otherwise than by said receipt or paper of March 9, 1888, there could not have been any prior adjustment, agreement, statement of account, or final settlement of the accounts between the parties as to said matter of $34,598.90, except as contained in said statement of account which was included in the instrument of March 9, 1888, as part of the settlement as a whole.

The said amount certainly related to transactions *connected with* said contract, and to the claims sued on in the action, as the suit was brought to recover that amount in part, and that sum was an item in and part of the account stated in the acknowledgment, and was included in the sum of $173,532.49 paid to Clark upon the signing of the receipt, as stated by his Honor Mr. Justice LACOMBE.

(Record, p. 532.)

It is also submitted that in the opinions of the two Judges who sat in the Circuit Court of Appeals it appears that while they agreed in the result they did not concur in the grounds of their decision.

Mr. JUSTICE LACOMBE bases his conclusion that the $34,598.90 was a liquidated claim in favor of Clark, upon the finding of the Referee that the receipt and paper contained an accurate *and undisputed* account of all dealings between the parties except in the matter of the forfeiture and the nut-locks ; from which he concluded that it must be assumed that that matter was not open to dispute ; while the learned senior Justice held that the statement of account rendered

by the defendant was evidence as against the defendant not only that it was an undisputed demand, but one the amount of which had been ascertained by the parties; and that, as no facts appeared in the findings of the Referee to the contrary, it is to be concluded that that part of the plaintiff's demand was liquidated as well as undisputed. *(Record, pp. 539, 540)*

His Honor Mr. Justice WALLACE, in his opinion, says:

"The case is not precisely one where the debtor refuses to pay the whole of an undisputed and liquidated demand, and exacts a promise from his creditor to receive part in satisfaction of the whole. Strictly, it is one where the creditor, having two undisputed and liquidated demands against the debtor, and the latter, claiming to have cross-demands or counterclaims against the creditor, refuses to pay the creditor's demands unless the validity of the cross-demands is acknowledged and their amount allowed to him by the creditor" *(p. 540)*.

He further said:

"The authorities are not altogether in accord upon the question whether in order that there may exist a valid consideration for a compromise both parties must concur in supposing the demand to be doubtful in point of right or amount, or whether it suffices if the claimant only entertains this belief and honestly supposes that he has a valid demand." "*It is well settled that there is a sufficient consideration when both parties regard the demand as possibly capable of enforcement.*" In *Union Bank of Georgetown vs. Geary* (5 Peters, 99) the Court said: "It is enough that the bank considered it a doubtful question; and that they supposed they were getting some benefit by foreclosing all inquiry on the subject; and the complainant by precluding herself from setting up the defense waived what she supposed might have been of some material benefit to her." See, also, *Callisher vs. Bischoffshein (L. R., 5 Q. B. 549), Keefe vs. Vogle (36 Iowa, 87), Flannigan vs. Kilcome (58 N. H., 443), Clark vs. Turnbull (47 N. J. L., 265), Connecticut River Lumber Co. vs. Brown (68 Vt., 239), Wahl vs. Barnum (116 N. Y., 87), McKinley vs. Watkins (13 Ill., 140).*"

There was nothing whatever in the present case to show that both parties did not regard the company's demands as possibly capable of enforcement. The railway company certainly so regarded them, and, more, it insisted that they were valid and enforceable, and Clark, by signing the acknowledgment, if not antecedently, not only conceded that they were probably capable of enforcement, but admitted that they were valid claims.

If the statement of account contained in the acknowledgment, not signed by the company at all, but only by Clark, made the account of credits to Clark, or charges against the company, liquidated sums, it certainly, if it did not absolutely liquidate the amount of the charges against him, showed that he considered such charges to be capable of enforcement, as he agreed that they were.

As Mr. Justice LACOMBE said in his opinion, it was not intended to hold

"that there was any bad faith on the part of the company in advancing these claims for the nut-locks and overtime penalty, *both items were legitimate matters of dispute*, and unless settled by agreement of the parties *might fairly be brought by either party into Court.*" *(p. 517.)*

And *Mr. Justice* WALLACE said that a demand was a disputed one, within the meaning of the rule as to liquidation, when it is so far disputable as to present a "proper case for litigation." (Citing: *Tuttle vs. Tuttle, 53 Mass., 551; Zoebish vs. Von Winden, 120 N. Y., 406; Honeyman vs. Jarvis, 79 Ill., 318*) (Record, p. 539)

The conditions, therefore, which Mr. Justice WALLACE held, would, if existing, constitute "a sufficient consideration," Mr. Justice LACOMBE says existed; or, at least, he says it was not intended to hold that they did not exist, that there was not any bad faith on the part of the company in advancing the claims for the forfeiture and nut-locks; that both items were legi-

timate matters of dispute, which might fairly be brought by either party into Court.

In Conclusion.

THE WRIT OF CERTIORARI SHOULD BE ISSUED IN THIS CASE FOR THE FOLLOWING REASONS :

The decision of the Circuit Court of Appeals in the case is so inconsistent with and contrary to the effect of the decisions of the U. S. Supreme Court in the cases hereinbefore alluded to, and also to the decisions of the Courts of the State of New York, and other States referred to, as to the payment and acknowledgment of such a settlement and acquittance as was made and given in this case, as a payment in full, and release of a large claim, that this Court ought to require the whole case to be brought before it for review, in order that it may be determined by the Supreme Court what is the true rule of decision to be applied to the facts found by the Referee and the Circuit Court in the case below, in respect to which the Circuit Court of Appeals has, it is submitted, applied the wrong rule, by seeking to overthrow the settlement, instead of sustaining it; and that the conflict of decisions in this case and in the cases hereinbefore referred to may be settled; and this especially in view of the fact that the decision of the Circuit Court of Appeals was made by a Court consisting of only two Judges who differ in their views and as to the methods by which they arrive at their conclusions; and that the case is an important one, both as to the amount involved, and the questions presented by the record which are solely questions of law.

All of which is respectfully submitted.

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No. 256.

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Supreme Court of the United States.

Filed April 11, 1900.

OCTOBER TERM, A. D. 1899.

No. 256.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

Petitioner,

vs.

HEMAN CLARK,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITIONER'S BRIEF AND ARGUMENT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 256.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Petitioner,*

vs.

HEMAN CLARK, *Respondent.*

Petitioner's Brief and Argument.

STATEMENT OF THE CASE.

Succinctly stated, the case presented by the record is this: In the years 1886, 1887, and 1888, the respondent Heman Clark, constructed some two hundred miles of railroad in the States of Iowa and Missouri for the petitioner, Chicago, Milwaukee & St. Paul Railway Company, under a written contract dated March 6, 1886. (The contract is printed in full, Rec. pp. 146-188.) During the period of construction the company paid Clark large sums in money on account. After the road was completed Clark and the company came

together for a final settlement. As stated by the referee by whom the case was heard originally: "The road was fully completed and ready for operation in the winter of 1887-1888, and in February 1888, *the parties endeavored, by their representatives, to adjust and ascertain the* EXACT AMOUNT REMAINING DUE TO CLARK, *with the result of differences of opinion, however, which ultimately led to this suit.*" (Record p. 51.) The chief engineer of the company, as was his duty, under the contract, certified to the total amount which Clark had *earned* under the contract. This amount was $3,895,798.79. (*Twentieth and Twenty-first findings*, Rec., pp. 196-202.) The dispute between Clark and the company, did not arise over the *amount earned* by Clark, but over the *amount that should be credited to the company*, the company claiming credits to the amount of $3,716,-865.20, while Clark contended that the total amount which should be credited was $3,667,306.59, or $49,558.63 less than the amount claimed by the company. This amount was made up of two items; one of $40,000 for overtime forfeiture or penalty, and the other of $9,558.63, the amount paid by the company for nut-locks furnished to Clark and used by him in the construction of the road. That these items were in dispute is found by findings of fact, conceded by opposing counsel in their argument in the court below, and by the judges who wrote the opinions in the Circuit Court of Appeals. Judge LACOMBE, who wrote the principal opinion, in considering this feature of the case says:

> "It is not understood, however, that the referee has held, nor is it intended in this opinion to hold that there was any bad faith on the part of the company in advancing *these claims for the nut-locks and overtime penalty;* **both items were legitimate matters of dispute, and unless settled by agreement of parties, might fairly be brought by either party into court.**" (Rec., p. 517.)

This dispute finally culminated in the company preparing a statement of the account between it and Clark as it claimed the same to be. Appended to this statement of account was a release for Clark to sign, if he accepted the balance therein stated, to be due him in full of all demands. The account and release were sent to him with notice that upon signing and returning the same to the vice-president of the company, a check for the balance shown by the account to be due would be sent to him. In due time the account and release were returned by Clark to the vice-president of the company, signed and witnessed, and immediately a check for the full amount of such balance to-wit: $173,532.49 was sent to Clark, who received it, deposited it in his bank--received the proceeds thereof which he has ever since retained, and has never offered to return.

The statement of account and release are as follows:

STATEMENT OF ACCOUNT, RECEIPT AND ACKNOWLEDGMENT OF MARCH 9, 1888.

Whereas, a final estimate has been made by D. J. Whittemore, chief engineer of the Chicago, Milwaukee & St. Paul Railway Company, of all the work done and material furnished under the contract made between said railway company and Heman Clark, bearing date March 6, 1886, for the construction of the railroad from Ottumwa, in Iowa, to the Missouri river, including all extra work performed and material furnished of every kind and description, which estimate, with the prior monthly estimates, less deductions made for work not done and work assumed by said company, amounts to	$3,895,798.79
And, whereas, the further sum of ..... should be credited to said Heman Clark for	34,598.90

materials sold by him to said company, and certain rebates and other matters of that description, making, with the amount of said estimates, the sum of..... 3,930,397.69

And, whereas, the said Chicago, Milwaukee & St. Paul Railway Company has paid the said Clark to apply on said contract, in money, material, labor and transportation, the sum of..... 3,626,865.20

And. whereas, by the terms of Section 4, Article 13, of said contract, said Clark was to be charged, in addition for the transportation, the sum of 50,000.00

And by a supplemental contract was to allow the said railway company, by way of forfeiture in case said railway was not completed by the first day of June, 1887, the further sum of..... 40,000.00

Making the amount paid on said contract, together with the allowance of said transportation, and the allowance of said forfeiture, the sum of..... 3,716,865.20

Leaving the amount still due said Clark on said contract the sum of..... 213,532.49

And, whereas, in and by said contract it was provided that the said Heman Clark, party of the first part, should save the said railway company free and harmless from all claims that might be made against said railway company for liens of workmen and claims of sub-contractors, and from all damage arising from not keeping sufficient fences to preserve crops and restrain cattle, and from all damages for cattle or other domestic animals killed or injured, and from all damages suffered by said sub-contractors and employees while engaged upon said work, of which said class of claims about..... 40,000.00

In amount have been made upon and are now pending in courts, by divers claimants against the said railway company, and the sum of.....	40,000.00
Of the amount so due as aforesaid under the said contract to the said Heman Clark has been reserved and set aside by said railway company as indemnity or security for the payment of said claims and of such other claims of the same class as may hereafter be made, in case said claimants, or any of them, recover judgments against said railway company; and the said..... ...	40,000.00
Or the balance thereof after paying and settling such claims as may be established against said railway company, is to be paid over to the said Heman Clark as soon as said claims are satisfied or said railway company suitably indemnified from any loss on account of the same, which.....	40,000.00
deducted from the said sum of.....	213,532.49..
So as aforesaid due said Clark, leaves due and owing by said railway company, and now payable on said contract to said Heman Clark, the sum of.....	173,532.49

Now, therefore, be it known, that I, the said Heman Clark, have received of and from the said Chicago, Milwaukee & St. Paul Railway Company the sum of one hundred and seventy-three thousand five hundred and thirty-two and 49/100 dollars ($173,532.49), in full satisfaction of the amount due me on said estimates, and in full satisfaction of all claims and demands of every kind, name and nature, arising from or growing out of said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of said railway company to account for said forty thousand dollars as hereinabove provided.

(Signed) HEMAN CLARK.

WM. C. EDWARDS.

(*Thirteenth finding*, Rec., pp. 113-115; *also findings on* pages 78, 79, 80 of Record.)

Judge LACOMBE in speaking of the execution of this release, says:

"*There is nothing in the findings to show that plaintiff "signed this receipt improvidently or without due considera-"tion, nor that it fails in any way to set forth accurately "the agreement entered into between the parties on that day, "nor that the plaintiff was under any pecuniary stress press-"ing him to accept a smaller sum than was due.*" (Rec., p. 518.)

Five years and six months after the execution and delivery of this release and the payment of the $173,532.49, Clark brought this action, not to set aside the settlement, but to recover over $305,900 claimed to be due him on account of the construction of the railroad, and for extra work and other claims growing out of the contract. He ignored the settlement entirely, and treated the $173,532.49 as a payment on account and not as a full satisfaction of all claims and demands arising or growing out of the contract and the construction of the road, as the release which he signed and delivered to the company states it was. Included in this $305,900 were the two items of $40,000 for overtime penalty and $9,558.63 for nut-locks which were part of and embraced within the account which was settled. The result, so far, of this litigation is that Clark has recovered on the two items of $40,000 and $9,558.63 and failed on the balance of his demands, excepting a recovery of a small amount, $2,425, a matter arising subsequent to the settlement and, therefore, not included within it.

The ground upon which the court below based its judgment, as appears by the opinions of Judges WALLACE and LACOMBE, is that the company, by the statement of account which it rendered Clark, conceded that it owed him the

sum of $173,532.49, and the items comprising the $49,558.63 being in dispute between them, the payment and acceptance of the sum of $173,532.49 in full satisfaction of all claims and demands constituted no consideration for the settlement or compromise of that dispute. In other words, the proposition is this: If two items of an account are in dispute, and a certain amount is paid and received on condition that it is in full settlement of the account, if it afterwards turns out that the amount so paid but equals the amount due on the undisputed items of the account, such payment constitutes no defense to an action to recover the amount of such disputed items. And this, notwithstanding, neither fraud nor mistake intervened, and both parties intended by the settlement to include within it such disputed items. The company contends that the account between it and Clark of matters arising out of the construction of the railroad was an entire thing, that the items of $40,000 and $9,558.63 being part of that account and in dispute, the balance due on the account was necessarily in dispute, and, therefore, the account as a whole was unliquidated; and such being the case the payment of the sum of $173,532.49 on condition that it should be received in full satisfaction of all claims and demands of every kind, name and nature arising from or growing out of the contract and of the construction of the railroad was a good and sufficient consideration for the settlement of the account as a whole; that neither the company nor Clark intended to make a partial or piecemeal settlement of the accounts between them; but on the contrary, both parties treated the accounts as an entirety and settled them as such. The instrument of settlement sufficiently proves this. And further: In the settlement the company allowed Clark $34,598.90 *in addition to the amount earned under the con-*

tract, for material which was left over on the completion of the road and for rebates and other matters of that description as shown by the statement of account upon which the settlement was made. This allowance was for a matter entirely outside the contract and was not included in the final or any estimate made by the chief engineer (Ninth Finding, Rec., pp. 127-135.) This allowance, the company contends, was a sufficient consideration to support the settlement independently of the dispute over the two items of $40.000 for overtime penalty and $9,558.63 for nut-locks and the payment of $173,532.49.

This action was originally brought in the State Court. On the application of the company it was removed into the Federal Court on the ground of the diversity of citizenship of the parties. After issue was joined the cause was referred to Hon. George Hoadly as referee. In due time he made his report and findings to the court; whereupon and on the 6th day of April, 1898, the cause came on for trial at a regular term of the Circuit Court of United States for the Southern District of New York, the Hon. Addison Brown, district judge, presiding. *Trial by jury was waived by written consent of the parties, filed with the clerk.* (*Rec., p. 22.*) *The court adopted the findings of fact of the referee and made them its findings of fact and ordered judgment thereon for the sum of $80,479.35.* (Rec., p. 224.) This judgment was affirmed by the Circuit Court of Appeals. The items composing the judgment are as follows:

1. $40,000 for overtime penalty allowed the company in the settlement.

2. $9,558.63 for nut-locks allowed the company in the settlement.

3. $2,425 for bridge timber alleged to have been appropriated by the company after the settlement was made.

4. $29,017.47 for interest and costs, less $521.75, the amount of company's counter-claim (*10th conclusion of law;* Rec., p, 119.)

Originally the complaint contained three causes of action (Rec., pp. 4-7), but by amendment the number was increased to six. (Rec., pp. 32-37.)

First Cause of Action.

By this cause of action it was sought to recover the sum of $71,057.63, the balance alleged to be due on the accounts arising under the contract for the construction of the road. This amount was made up of the following items:

1.	For nut-locks charged to Clark and included in the credit of $3,626,865.20 allowed the company in the settlement of March 9, 1888	$ 9,558.63
2.	For amount overtime penalty or forfeiture allowed the company in the settlement.	40,000.00
3.	For money paid by the company to subcontractors under Clark and for death of brakeman during the construction of road out of the $40,000 withheld as indemnity, as provided in the instrument of settlement	21,499.00
	Total	$71,051.63

Second Cause of Action.

By this cause of action it was sought to recover the sum of $232,705.66 for work done and material furnished in excess of that required by the contract.

THIRD CAUSE OF ACTION.

By this cause of action it was sought to recover the sum of $2,196 for damages alleged to have been sustained by reason of the alleged failure of the company to procure certain rights of way in time for the proper performance of the contract.

FOURTH CAUSE OF ACTION.

By this cause of action it was sought to recover the sum of $140,460.16, alleged to have been the amount in value of the materials furnished and work performed in excess of that which it is alleged the company represented would be required at the time the contract was entered into.

FIFTH CAUSE OF ACTION.

By this cause of action it was sought to recover the sum of $2,425, the value of certain bridge timber which it is alleged the company wrongfully converted to its use in June, 1888, *three months* after the aforesaid settlement was made.

Note: This cause of action, which sounds in *tort*, was allowed against defendant's objection at the close of plaintiff's case. (Rec., pp. 280-282.)

SIXTH CAUSE OF ACTION.

By this cause of action it was sought to recover the sum of $89,833.33 for embankment and piling furnished in excess of that required by the contract for the construction of the road.

By the findings and the judgment entered thereon, the second, third, fourth and sixth causes of action and the third item, $21,499 of the first cause of action, are wholly eliminated from the case, leaving for consideration the two items of $9,558.63 for nut-locks and

$40,000 for over-time penalty, embraced within the first cause of action, and $2,425 claimed by the fifth cause of action.

As to the items of $9,558.63 and $40,000, the contention of the company is, that they having been included in the settlement of March 9, 1888, such settlement is a complete bar to a further recovery. As to the item of $2,425 claimed in the fifth cause of action for bridge timber, alleged to have been wrongfully appropriated, the company denies having taken or appropriated it, and there is no evidence—not even a scintilla—in the record which in any manner sustains the allegations of the complaint or the findings of the court, and that this cause of action, which sounds in *tort*, is improperly united with the remaining causes of action which are based upon contract, and having properly and timely excepted thereto, the court erred in entering judgment thereon in favor of Clark. (Rec, pp. 280-282)

As the trial was had before the court without a jury, trial by jury having been expressly waived by written consent of the parties, filed with the clerk (Rec., p. 221), and the court having adopted the findings and conclusions of the referee and made them its findings of fact and conclusions of law, the questions which arise upon the record are:

1. **Do the findings of fact support the judgment as to the items of $9,558.63 for nut-locks, and $40,000 for overtime penalty?**

2. **Is there any legal evidence in the record to support the findings and the judgment entered thereon as to the item of $2,425 for bridge timber alleged to have**

been wrongfully converted by the company in June, 1888?

3. **Whether, in an action on contract, the complaint may be amended on the trial against the objection of the defendant by adding thereto a cause of action in tort and a recovery allowed on such additional count?**

The first of these questions is raised by the findings themselves, the exception to the ruling of the court in refusing to order judgment for the defendant and in ordering judgment for the plaintiff (Rec., pp. 222, 223, 224 & 226-229), and by the several assignments of error, particularly the *sixth*, *seventh*, *eighth*, *ninth* and *eleventh* assignments of error. (Rec., p. 479), and the *thirty-sixth* and *thirty-seventh* assignments of error (Rec., p. 488).

The second of these questions is raised by the refusal to find, as requested, that the defendant did not in the month of June, 1888, or at any other time, wrongfully or otherwise take possession of any timber belonging to the plaintiff, or convert the same to its use for the purposes of repairing a washout or otherwise. (*Request No. 37*, Rec., p. 211) the exception thereto (*Exception No. 27*, Rec., p. 263, *also Exception No. 17*, Rec., p. 456), and the several assignments of error, particularly the *seventy-fourth* assignment of error. (Rec., p. 501.)

NOTE: These exceptions and assignment of error were based expressly upon the ground that there was no proof in the case to sustain the findings that the defendant wrongfully or otherwise took or appropriated the timber in question.

The remaining of these questions is raised by the motion made at the close of the plaintiff's case to amend his complaint (Rec., p. 280), the objection thereto (Rec., p. 282), the overruling thereof (Rec., p. 284), the exception thereto

(Rec., p. 285), the motion for arrest of judgment, the denial thereof and the exception thereto (Rec., pp. 225-226), and by the *sixteenth*, *seventeenth* and *eighteenth* assignments of error. (Rec., pp. 481-482.)

FINDINGS OF FACT.

1.

That in the month of March, 1886, the defendant, the Chicago, Milwaukee & St. Paul Railway Company, made and entered into a contract in writing with the plaintiff, dated the 6th day of March, 1886, for the construction of a line of railroad from a point in the city of Ottumwa, Iowa, to a place called Harlem Station, in the State of Missouri, a distance of about 202.8 miles, to be completed on the first day of August, 1887, a copy of which contract is hereto annexed marked "A." (It is contained in the fourth of the defendant's last requests to find, *between pages 147 and 187 of the Record.*)

2.

That immediately after the execution of the said contract the plaintiff proceeded to carry out and perform the same, and did carry out and perform the same, except a portion thereof otherwise agreed between the parties, and substantially completed the same on or about the 1st day of November, 1887, and the same was duly accepted by the defendant on or about the first part of March, 1888.

3.

That on or about the 3rd day of March, 1888, the chief engineer in charge of the said work under said contract made a final certificate and estimate, which is copied in full in the 20th and 21st findings of fact last asked by the defendant, and by this reference is made part thereof. (Rec., pp. 196-202.)

4.

That said certificate and estimate were delivered to the defendant, but were never delivered to the plaintiff or any

of his agents and were not seen by the plaintiff or any of his agents or brought to his knowledge otherwise than by the reference thereto in the receipt of March 9, 1888, hereinafter referred to, until the trial of this action.

5.

That the consideration for the performance of said contract originally mentioned in said contract was $3,914,600, but before the execution of said contract by the plaintiff, by and with the consent of the defendant, the consideration was changed and made $3,954,600.

6.

That the plaintiff made and entered into a supplemental contract whereby he agreed with the defendant to complete his performance of said contract on or before June 1, 1887, and to allow the said defendant, by way of forfeiture, in case the said railway was not so completed by the 1st of June, 1887, the sum of $40,000.

7.

That the defendant failed to furnish the plaintiff with rights of way, as by said contract it had agreed to do in time to enable the plaintiff to complete his contract, prior to the 1st of June, 1887, or prior to the 1st of August, 1887, but on the contrary, delayed the plaintiff in the performance of said contract, at a point upon the said road known as Minneville, until October 27, 1887, by reason of the neglect, failure and omission of the defendant to obtain the necessary right-of-way at said point so as to permit the construction of the road and completion of the contract at said point.

8.

That the plaintiff was thereby prevented from completing his contract on or prior to August 1, 1887, and also on or prior to June 1, 1887, by the negligence, omission and fault of the defendant.

9.

That during the progress of the work the defendant purchased and furnished to the plaintiff and charged him for patented nut-locks for which the defendant paid $9,558.63.

10.

That the said nut-locks so furnished by the defendant were used by the plaintiff in the construction of the road.

11.

That there are no provisions in the contract which require that the plaintiff, and the plaintiff never agreed that he should use, in the construction of the railroad under said contract, any patented nut-locks.

12.

That the plaintiff was ordered by the defendant to put such nut-locks on the road at the beginning of the work. That he protested against their use, and finally yielded and used them in track laying upon the promise that the matter of the charge for said nut-locks should be adjusted after the completion of the contract.

13.

That upon the 9th day of March, 1888, the plaintiff signed and caused to be delivered to a representative of the defendant a paper, writing or receipt presented to him by the defendant for signature, of which the following is a copy; and upon the signature thereof by said Clark, and its delivery by him to the defendant, the plaintiff was paid by the said defendant the said sum named therein of $213,532.49, *less the sum of $40,000 claimed in said paper to be retained for forfeiture in not completing performance of his work under said contract on or prior to June 1, 1887.* *

And the sum of $3,626,865.20 included therein embraces said sum of $9,558.63 claimed by defendant to be due or nut-locks. Said $40,000 was deducted, and the actual amount so paid was $173,532,49.

(Here follows copy of statement of account and release of March 9, 1888, printed in full on pages 3, 4 and 5 of this brief.)

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* This is an error, probably an oversight on the part of the referee. The $40,000 which was deducted from the $213,532.49 was not the $40,000 claimed by the company for overtime penalty, but was the $40,000 which was witheld by the company, by Clark's consent, as an indemnity or security for the payment of claims and liens of sub-contractors and other parties, which it is found the company properly expended, and $521.75, more, in settlement of such claims and liens. (*See 14th finding of fact, Rec., p. 116, 11th finding of fact, Rec., p. 136, and 25th finding of fact, Rec., p. 206.*

14.

That said receipt and paper contained an accurate, truthful and undisputed account of all dealings between said parties, except in the matter of the $40,000 deducted for time forfeiture, the $9,558.63 for nut-locks embraced in the $3,626,865.20 and the lumber hereinafter referred to, and herein valued at $2,425. Besides the above, the defendant has paid the $40,000 reserved as indemnity or security for the payment of claims against Clark, and in addition thereto upon like accounts, the sum of $521.75.

15.

That at the time of the signing and delivery of said last-mentioned paper, the final certificate or estimate of the chief engineer under the contract had not been delivered to the plaintiff, or any of his agents, by the defendant or the said engineer, and the contents thereof were not known to the plaintiff, other than by the reference thereto contained in said receipt of March 9, 1888.

16.

That no other final settlement of the accounts under said contract had been had between the plaintiff and the defendant at the time that the said last-mentioned paper was signed and delivered.

17.

That at the time of the signing and delivery of said last-mentioned paper, the question of the liability of the plaintiff for nut-locks, which had been left by the parties to this action, open for settlement and adjustment until after the completion of the work under said contract, and had been referred to by the defendant to the chief engineer under said contract, had not been passed upon by him; that the said chief engineer had referred the question for opinion to the defendant's counsel, who had not at said time given his opinion in relation thereto.

18.

That no account was ever, otherwise than by said paper and the receipt of said money, stated of the transactions under and connected with said contract between the plaintiff and the defendant.

19.

That in, or about, the months of March and April, 1888, the plaintiff was the owner of 97,000 feet B. M. bridge timber then in the yard of the defendant at Chillicothe, and along the line of the railroad.

20.

That the said lumber did not conform to the standard of the defendant, and was not purchased by the defendant from the plaintiff, or allowed in the final certificate of the chief engineer, under the contract in this section to the plaintiff.

21.

That in and about the month of June, 1888, the defendant took possession of the said lumber and converted the same to their own use without assent or knowledge of the plaintiff

22.

That the value of the said lumber at the time of the taking, in June, 1888, was $2.425.

GEO. HOADLY,
Referee.

CONCLUSIONS OF LAW.

1.

That the defendant is not entitled to charge the plaintiff, or to retain and deduct from the amount earned and payable to the plaintiff under the said contract, the sum of $40,000 as a forfeiture or liquidated damages for not completing the contract upon June 1, 1887.

2.

That under the facts proved in this case, the plaintiff is not legally liable to the defendant for any damages for failure to complete the contract within the contract time or the time agreed upon, for the reason that the plaintiff was prevented, by the negligence of the defendant, and its omission to procure the necessary right-of-way, from completing the said work in such time.

3.

That the plaintiff is not liable to the defendant for the sum of $9,558.63, the cost of patent nut-locks furnished by the defendant to the plaintiff, and used by him in the performance of the said contract.

4.

That there was no obligation imposed by the contract upon the plaintiff to furnish and pay for patent nut-locks to be used in the construction of the said road.

5.

That the plaintiff is not legally indebted to the defendant in any sum whatever for patent nut-looks furnished by the defendant and used in the construction of the railroad under said contract.

6.

That the plaintiff is entitled to recover from the defendant the sum of $2,425, with interest, from June 1, 1888, for the conversion by the defendant of lumber belonging to the plaintiff.

7.

That the signing and delivery, by the plaintiff, of the receipt, on or about the 9th day of March, 1888, and the acceptance of the check of $173,532.49, under the facts and circumstances proved in this case were, as to the two sums of $9,558.63, charged for nut-locks, and $40,000 charged by way of forfeiture for non-performance in time wholly without consideration, and in violation of the contract between the parties, and do not constitute any bar to the recovery of the plaintiff for the sums of $9,558.63 and $40,000, otherwise as due other the contract.

8.

That the signing and delivery of said receipt, and the acceptance of the check thereunder, do not constitute a legal payment or accord and satisfaction of the said sums of $9,558.63 and $40,000, or either of them, or any part or either of them.

9.

That no account of the transactions, under this contract, and of the claims sued on in this action, was ever had, or

stated between the parties to this action otherwise than by said receipt, or paper, of March 9, 1888.

10.

That the plaintiff is entitled to recover the amount certified by the chief engineer, of $3,895,793.79, without the deduction claimed by the defendants for nut-locks of $9,558.63, and without allowance to the defendant by way of forfeiture for non-completion of the railway on the 1st day of June, 1887, said sums together amounting to $49,558.63, with interest, from March 9, 1888; and is also entitled to recover for timber used by the defendant on the 30th day of June, 1888, to the amount of $2,425, with interest, from June 30, 1888, the whole amounting, at the date of this report, viz.: the 4th day of December, 1897, to the sum of $81,305.88, for which, with interest from this date and disbursements, the plaintiff is entitled to judgment, less amount paid by the defendant in excess of the reserved $40,000, $521.75, with interest, from and to the same date, being in all this day, $826.53.

There will be judgment, therefore, for the plaintiff for $80,479.35, with interest and costs, interest to be computed from December 4, 1897.

GEO. HOADLY,
Referee.

In addition to the foregoing findings of fact, twenty-seven additional findings of fact were made at the request of defendant. It is not necessary to state them in full at this time, but they may be found in the record pages 120 to 137, 146, 188, 189, 190, 191, 193, 195, 196, 203, 206 and 210, and will be subsequently referred to in our argument. They relate to the execution of the contract for the construction of the road, the supplemental agreement by which the sum of $40,000 should be deducted from the contract price, if the road was not completed by June 1, 1887, the failure of Clark to complete the road within that time, the final estimate and certificate of the chief engineer of the company, the sending of the statement of account

and form of release to Clark with the information that upon the same being signed and returned by him a check for the balance due him, $173,532.49 would be sent to him, the return of said statement of account and release signed by Clark and witnessed, the sending to him of a check of the company for such balance, the deposit and collection of said check by Clark, and his retention of the amount paid him thereon, the expenditure of the $40,000 and $521.75 besides, reserved by the company with Clark's consent at the time of the settlement, to meet unpaid claims against Clark incurred in the construction of the road, the furnishing of the nut-locks to Clark by the company for use in the construction of the road.

And by the twelfth finding (Rec., p. 136) it is found that the company did not require Clark to furnish any material or perform any work, or to furnish or erect any structures of a more expensive design than required of him by the contract for the construction of the road, otherwise than allowed for in the final estimate and certificate of the chief engineer.

Aside from these formal findings, the referee made quite a full report of the case which will be found at pages 49–98 of the record.

ERRORS RELIED UPON.

1. *The court below erred in holding that the findings of fact support the judgment as to the item of $9,558.63 for nut-locks, and the item of $40,000 for time forfeiture.*

2. *The court below erred in holding that there was no consideration for the settlement made by the parties as to the items of $9,558.63 for nut-locks, and $40,000 for time forfeiture.*

3. *The court below erred in holding that the question, whether there was* ANY *evidence in the record to sustain the finding that the defendant in June, 1888, wrongfully took possession of certain lumber and converted it to its own use, was not reviewable.*

4. *The court below erred in holding that it was proper to allow the plaintiff to amend his complaint on the trial, against defendant's objection, by adding thereto a cause of action sounding in tort, and recover thereon.*

ARGUMENT.

I.

The court below erred in holding that the findings of fact support the judgment as to the item of $9,558.63 for nut-locks and the item of $40,000 for time forfeiture. Under the findings the judgment as to these items should have been in favor of the company.

By the thirteenth finding of fact it is found that on the 9th day of March, 1888, Clark signed and caused to be delivered to the company the statement of account, receipt and acknowledgment, which are made a part of such finding, and that thereupon the company paid to Clark the sum of $173,532.49, which amount he received in full satisfaction of all claims and demands of every kind, name and nature arising from or growing out of the contract for the construction of the railroad, excepting the obligation of the company to account for the $40,000 reserved to meet certain claims against Clark as stated in the account or instru-

ment of settlement. By the twenty-second and twenty-fourth findings of fact (Rec., pp. 203, 206), it is found that this account or instrument of settlement was sent to Clark by the vice-president of the company with notice that when he signed and returned it, a check for $173,532.49 would be delivered to him, that Clark signed and returned said instrument of settlement and received a check for the amount stated, which check was paid and the amount thereof received by Clark, which he has ever since retained. *It is also found as a fact by the thirteenth and fourteenth findings that the sum of $9,558.63 claimed by the company to be due it for nut-locks furnished to Clark, was embraced within the settlement. It likewise appears by the instrument of settlement itself, that the $40,000, claimed by the company on the ground that the road was not completed within the time specified in the supplemental agreement, was also embraced within the settlement.*

The legal effect of these findings of fact is that the settlement evidenced by said statement of account, receipt and acknowledgment, is a complete and absolute bar to a recovery in this action for any of the items embraced therein, *unless there are other facts found which avoid or set aside the settlement in whole or in part.* The "*other facts*" necessary to be found in order to defeat the settlement are:

1. *That the settlement was procured by fraud.*
2. *That it was the result of mutual mistake or*
3. *That it was without consideration.*

Before considering the findings of fact on which the Circuit Court entered judgment against the company, let us recur to the rules of law that govern settlements of this character. They are:

"1. *The law favors settlements by parties without judi-*
"*cial intervention, and therefore lends every presumption to*
"*support them; it presumes that they were made in good*
"*faith, without fraud or mistake, and that a consideration*
"*sufficient to support them moved from one party to the*
"*other.*

"2. *That settlements once made will be allowed to stand*
"*and will be held to be binding upon the parties to the full*
"*extent they purport on their face to bind them, until they*
"*are set aside or avoided for either fraud, mistake or want*
"*of consideration.*

"3. *The burden is upon the party seeking to avoid a*
"*settlement to show that it was procured by fraud, or was the*
"*result of mutual mistake, or was without consideration.*

"4. *This burden is not met by offering proof that is con-*
"*flicting or uncertain in its character or meaning, or proof*
"*that is susceptible of different constructions, theories, or in-*
"*ferences. The proof must be certain and convincing and,*
"*taken as a whole, consistent with no other theory than that*
"*the settlement was procured by fraud or was the result of*
"*mutual mistake, or was without consideration.*"

This is the rule; otherwise courts might commit a greater wrong in setting aside a settlement once made. than the party seeking to get rid of it claimed was committed against him in making it.

"No practice could be more dangerous than that of "opening accounts which the parties themselves have ad-"justed on suggestion supported by doubtful or by only prob-"able testimony. * * * The whole labor of proof lies "upon the party objecting to the account, and errors which "he does not plainly establish cannot be supposed to exist." Chief Justice MARSHALL in *Chappelaine vs. Dechenaux*, 4 Cranch., 309.

"Much the largest number of controversies between busi-
"ness men are ultimately settled by the parties themselves;
"and when there is no unfairness, and all the facts are
"equally known to both sides, an adjustment by them is final
"and conclusive. Oftentimes a party may be willing to yield
"something for the sake of a settlement; and if he does so
"with a full knowledge of the circumstances, he cannot affirm
"the settlement, and afterwards maintain a suit for that which
"he voluntarily surrendered." Justice CLIFFORD in *Hager vs. Thompson*, 1 Black., 80-94.

"The law favors settlements, and courts will not open or
"disturb them but for very cogent reasons." LYON, J., in *Hoyt vs. McLaughlin*, 52 Wis., 283.

"The transaction then being an account stated is con-
"clusive upon the parties, unless the plaintiff affirmatively
"shows fraud or mistake. The law is stated in *Phillips vs.*
"*Belden*, 2 Edw. Ch., 1, that if either party attempts to im-
"peach the settlement and to open the accounts for re-exami-
"nation, either wholly or in part, and which can only be
"done upon the ground of fraud, mistake or error, the
"burden of proof rests upon the party impeaching, and he
"must prove the fraud or point out the error or mistake on
"which he relies." PARKER, J., in *Lockwood vs. Thorne*, 11 N. Y., 175.

The foregoing propositions of law are applicable to and control this case; and when as here the court will review the findings of fact only (not the evidence), for the purpose of determining whether the judgment as to the items of $9,558.63, allowed for nut-locks, and $40,000 allowed for forfeiture, is supported by them, such findings must be certain and in their terms find either fraud, mutual mistake or want of consideration, or taken as a whole, inconsistent with any other theory than that the settlement was procured by fraud or was the result of mutual mistake, or was without consideration, before the court will be warranted in ignoring it, as to either or both of the foregoing items and allowing a recovery therefor.

If the findings are doubtful or uncertain in meaning, or

if they are as consistent with the contention of the company as they are with the contention of Clark, then the settlement must stand, and the judgment herein should have been for the company and not for Clark.

Keeping the above rules in mind, a review of the findings of fact will show that the judgment herein is wholly without support as to either of the items of $9,558.63 for nut-locks, or $40,000 for forfeiture. Aside from the *thirteenth* finding of fact, which finds that a settlement was made between Clark and the company of all matters arising out of the construction of the railroad, the findings which relates to these two items are the *seventh*, *eighth*, *ninth*, *tenth*, *eleventh*, *twelfth*, *fourteenth*, *fifteenth*, and *seventeenth* findings of fact.

It is found by the *seventh* and *eighth* findings of fact that the company failed to furnish Clark with rights-of-way, as it had agreed to do, in time to enable him to complete his contract within the time specified, and delayed him in the performance thereof at a point upon the railroad known as Minneville until October 27, 1887, and that, by the fault and negligence of the company in this respect, Clark was prevented from completing his contract within the required time. It may be conceded, if there had not been a settlement made which embraced the item of forfeiture, and the amount thereof had been withheld by the company, that the facts found by these findings would authorize a recovery thereof, in an action brought against the company for that purpose. But this is not now material. The question here presented is: Was there a sufficient consideration for the settlement as a whole? *If a dispute existed between the parties with respect to any matter embraced within the settlement, that dispute furnished a sufficient consideration for the settlement.* Was there such a dispute? Aside

from the *fourteenth* finding, which finds that these items of nut-locks and forfeiture were in dispute, the findings do not, in terms, show that there was, nor that there was not, a dispute as to the item of $40,000 charged for forfeiture; but from the *seventh* and *eighth* findings themselves, it may properly be inferred that the *facts* upon which these findings are based, were in dispute. Opposing counsel conceded in their brief and argument in the court below that the *right* to deduct the amount of the forfeiture from the amount earned by Clark was in dispute.

However this may be, this court is, by the law, compelled to assume that there was a dispute. Presumptions arise upon facts. The material fact in this case is this: A contract evidencing a settlement was made. Upon that fact a presumption arises that it was made upon sufficient consideration; and it necessarily follows that it was incumbent upon Clark to prove want of consideration. The burden of proof rested upon him, and in order to prove want of consideration he was bound to negative every element which, under the law of contracts, may properly constitute a consideration for a contract of settlement. It was, therefore, incumbent upon him to prove that there was no dispute, and the court is now conclusively bound to assume that he failed to make such proof, for there is no finding of a want of consideration, nor is there any finding that no dispute existed between the parties at the time of the settlement. As before stated, the *seventh* and *eighth* findings presuppose that the facts upon which they are based were in dispute; otherwise there would have been no necessity or occasion for the court to have made the findings; and counsel for respondent concede that they were in dispute, for they say the *right to make the deduction was questioned.*

And Judge LaCombe says, in speaking of the claims for nut-locks and over-time penalty: **"Both items were "legitimate matters of dispute, and unless settled by "agreement of parties, might fairly be brought by "either party into court."**

We therefore contend that there is nothing in either the *seventh* or *eighth* findings of fact which in any manner affect the validity of the settlement made by the parties as found by the *thirteenth* finding of fact; but on the contrary they support the settlement.

It is found by the *ninth*, *tenth* and *twelfth* findings of fact that during the progress of the work the company purchased and furnished to Clark, and charged him for, nut-locks for which the company paid $9,558.63; that Clark was ordered by the company to put such nut-locks on the road at the beginning of the work; that he protested against their use, and finally yielded, and used them upon the promise that the charge which the company had made for them *would be adjusted after the completion of the work*. From these findings it clearly appears that the charge for nut-locks was unadjusted, and therefore in dispute at the time of the settlement, and that the right of the company to require Clark to use nut-locks in the construction of the road, and charge him therefor, came into dispute at the very beginning of the work under the contract. Such dispute was a sufficient consideration for the adjustment of the charge for nut-locks, which was made "*after the completion of the contract*," by the settlement of March 9, 1888. In view of the arrangement that the question of the liability for this charge should be adjusted "*after the completion of the contract*," it is fair to presume that both parties intended thereby to settle that question at the time when a final settlement of all matters arising out of the construction of the railroad should be made. Clark must therefore have known that the settlement which the company offered him,

and which he accepted, *after the completion of the contract*, settled the dispute concerning the liability for the charge for nut-locks, the same as it settled all other matters between him and the company arising out of the construction of the road. There is certainly nothing in any of these findings which can be construed as a finding of fraud, mutual mistake or want of consideration.

The *eleventh* finding of fact that there are no provisions in the contract which required Clark to use, and that he never agreed to use, nut-locks in the construction of the road, is neither a finding of a want of consideration, or of a mutual mistake of fact. So far as this finding relates to the written contract under which the road was constructed, it is a conclusion of law and not a finding of fact. It is fair to presume, in view of the *twelfth* finding of fact, that there was a dispute between Clark and the company from the beginning of the work under the contract, with respect to the use of nut-locks, in the construction of the road—Clark contending that the contract did not require him to use nut-locks, while the company claimed that it did. This being true, the allowance by Clark in the settlement of March 9, 1888, of the amount charged by the company for nut-locks, was not even made under a mutual mistake of law; and, if it was, that furnishes no ground for setting aside the settlement; for money paid under a mistake of law, with full knowledge of the facts, is not recoverable. *There is no finding that Clark did not have a full knowledge of all the facts at the time he made the settlement*, and without such finding, the presumption is that he had such knowledge. So far as this finding relates to any supposed or claimed agreement outside of the written contract under which the road was constructed, it does not find that the *facts* upon which this finding is based were not in dispute; and, if it is necessary, in order to support the settlement, that such facts should

have been in dispute, the law will presume that they were in dispute, and that such dispute was in good faith, for the law will presume in favor of the settlement.

It is found by the *fourteenth* finding of fact, that the statement of account, receipt and acknowledgment, contained an accurate, truthful and undisputed account of all dealings between the parties, *except in the matter of the $40,000 deducted for time forfeiture, and the $9,558.63 for nut-locks*, embraced in the credit of $3,626,865.20, claimed by the company in said statement of account, as a credit to be applied in payment of the amount earned by Clark under the contract for the construction of the road. Unless this finding means that the statement of account was inaccurate, untruthful and *disputed as to these two items*, then it does not amount to a finding one way or the other as to these items; that is, it does not find that these items were accurate or inaccurate, truthful or untruthful, disputed or undisputed. If it means that the statement of account was inaccurate and untruthful as to these items, that furnishes no ground for setting aside the settlement, for it is not found that Clark did not have full knowledge thereof at the time he received the money and made the settlement. If it means that the statement of account as to these items was disputed, then such dispute was a sufficient consideration to support the settlement in its entirety. If, however, it does not amount to a finding one way or the other, as to these items, then it is wholly immaterial. And if the foregoing is not a correct interpretation of the finding, then the most which can be said of it is, that it is doubtful and uncertain in its meaning, and is as consistent with the contention that these items were in dispute between the parties as that they were not in dispute. Whichever of these views may be taken of this finding, the result is that it in no way disturbs

or invalidates the settlement, which is found by the thirteenth finding of fact was made by the parties.

It is found by the *fifteenth* finding of fact, that at the time Clark signed and delivered the statement of account, receipt and acknowledgment to the company the final certificate or estimate of the chief engineer had not been delivered to Clark or to any of his agents, by either the company or the chief engineer, and that the contents thereof were not known to Clark other than by reference thereto contained in said statement of account, receipt and acknowledgment. This finding amounts to nothing in any aspect of the case, unless there was an obligation on the part of the company requiring it to deliver the final certificate and estimate of the chief engineer to Clark, and even then it is wholly immaterial as affecting the settlement. The contract under which the final certificate and estimate were made, did not require that they shou'd have been delivered to Clark or to any of his agents; on the contrary, it provides, Section 2, Article 15, that the chief engineer should furnish said certificate and estimate to the railway company only, which he did. The referee so held in his first report. (Rec., p. 77; fol. 231.) And further, if there had been an obligation on the part of the company to deliver the final certificate and estimate to Clark, compliance therewith could have been waived by him. He was advised by the very first line and paragraph of the statement of account, that the chief engineer had made a final estimate of all work done and material furnished by him under the contract. Had he desired to examine the same before making a final settlement, it is fair to presume that this privilege would have been accorded him; it is likewise fair to presume that at the time the settlement was made, he was satisfied with the statement of account and the settlement proposed thereby,

and therefore did not desire an examination of the final certificate and estimate of the chief engineer.

The *seventeenth* finding of fact is as follows:

"That at the time of the signing and delivery of said last-mentioned paper, the question of the liability of the plaintiff for nut-locks, which had been left by the parties to this action open for settlement and adjustment until after the completion of the work under said contract; and had been referred to by the defendant to the chief engineer under said contract, had not been passed upon by him; that the chief engineer had referred the question for opinion to the defendant's counsel, who had not at said time given his opinion in relation thereto." (Rec., p. 116; fol. 348.)

Concerning this finding it may first be observed that it but supports and emphasizes the contention of the company that the charge for nut-locks was in dispute at and prior to the time of the settlement, for it is found by this finding that the question of Clark's liability to pay for the nut-locks had been left by the parties open for *settlement and adjustment* until after the completion of the work under the contract. The gist, however, of the finding is that the question of liability for the nut-locks had been referred *by the company* to its chief engineer, and by that officer to the counsel of the company for an opinion, and that neither had passed upon it at the time Clark signed and delivered the statement of account, receipt and acknowledgement of March 9, 1888, to the company. Does this finding in any way or to any extent invalidate or avoid the settlement? It does not, unless it amounts to a finding of fraud on the part of the company, or that the settlement, so far as it embraced the nut-locks, was the result of a mutual mistake between Clark and the company. It does not amount to a finding of fraud, for it is not found that Clark or his agents consented to any such reference or agreed to be bound by either the opinion of the chief engineer or the counsel of the company. Neither is it found that either Clark or his

agents at any time knew that the company had referred the question of Clark's liability for the nut-locks to its chief engineer, or that the chief engineer had referred the question to the counsel of the company for an opinion. *Neither is it found that the company, in any manner, concealed from Clark, or his agents, anything which was essential for him to know concerning its action regarding the nut-locks, or the reference to either its chief engineer or counsel of the question of Clark's liability therefor.* And further, if it be conceded that Clark knew that this question had been referred to the chief engineer for an opinion, either with or without his consent, *there is no finding that Clark did not know at the time he signed and delivered the statement of account, receipt and acknowledgement to the company, and received the balance shown to be due him thereby in full settlement of all matters between him and the company, that the chief engineer or the counsel of the company had not passed upon the question of his liability for the charge which the company had made against him for these nut-locks; or that he did not have full knowledge of all the facts in reference thereto.* In the absence of such a finding it must be presumed that Clark, at the time he made the settlement, had full knowledge of all the facts, and knew that the chief engineer and the counsel of the company had not passed upon the charge for nut-locks, and that he was satisfied with the settlement proposed by the company, regardless of whether the chief engineer and counsel had or had not passed upon the question of his liability for the nut-locks, or how they had decided it. It does not amount to a finding of mutual mistake, for it is not found that Clark and the company both supposed, when the settlement was made, that the chief engineer and counsel of the company had passed upon the question which had been referred to them concerning the

liability for the nut-locks, or that the settlement was made upon any such supposition, or upon the supposition that the item of nut-locks was not included in the settlement. The company certainly did not act upon any such assumption, for it then claimed the amount charged for the nut-locks, and included it in the statement of account. *When as here, the parties stand on an equal footing, and there is an absence of fraud or misrepresentation, a mistake of fact of one of the parties to the settlement, furnishes no ground for setting aside the settlement.* **The mistake to be availing must be a mutual mistake.** That the settlement was made in the utmost good faith and fairness, there is not the least doubt. To repeat again what Judge LACOMBE said in speaking of it:

"*There is nothing in the findings to show that plaintiff "signed the receipt improvidently or without due considera- "tion, nor that it fails in any way to set forth accurately the "agreement entered into between the parties on that day, nor "that the plaintiff was under any pecuniary stress pressing "him to accept a smaller sum than was due.*" (Rec., p. 518.)

This statement is fully sustained by the testimony of Clark:

"I supposed at the time this receipt was signed and I got this check, that all the work was done, and I was expecting a *final payment* on account of the contract. *It was time for it and I naturally expected it.*" (Rec., p. 406.)

Recurring to the findings of fact, they show that neither fraud nor mistake intervened in the settlement—neither is claimed. They also show that the items of $40,000 for overtime forfeiture and $9,558.63 for nut-locks were embraced and included in the settlement, and that Clark knew that and intended to make a settlement of all matters, disputed and undisputed, between him and the company,

when he signed the release and accepted the $173,532.49, as the whole amount due him under his contract. They also show that these items were in dispute, and as Judge LACOMBE states in his opinion, "*Were legitimate matters of dispute.*" So that we come back to the single question in the case, Was the dispute over these two items a sufficient consideration to support the settlement as a whole? Counsel for respondent contends that it is not; and this, for the reason that as to all the items embraced in the settlement, with the exception of the two items which were in dispute, there was no dispute between the parties, and by the payment of $173,532.49 the company paid Clark no more than he was legally entitled to, exclusive of the two disputed items, and therefore, as to them, the settlement was without consideration. Conceding that the only items of the account between the parties that were in dispute, were the items of $40,000 for overtime forfeiture, and $9,558.63 for nut-locks, the question arises, What was the legal effect of this dispute? We submit that it was to make the account an unliquidated and disputed account, for these items were part of the account, and being in dispute, the balance due on the account was necessarily in dispute. An account cannot be said to be liquidated when the amount of the balance due is in dispute. This was the condition in which the account between the parties was prior to the settlement, Clark claiming that a balance of $223,091.12 was legally due him, while the company insisted that but $173,532.49 was legally due him. This dispute could be adjusted only by agreement of the parties or by litigation. Clark knew this. Knowing this, he concluded that it would be to his advantage to accept the balance tendered him by the company as the balance due him, rather than incur the expense, delay and chances of

litigation. The consideration, therefore, which moved Clark to make this settlement is the consideration which inheres in and supports every settlement between parties when a dispute exists over the balance due, namely: the avoidance of litigation. A compromise, says Mr. Justice BOUVIER in his valuable Law Dictionary, is:

"An agreement between two or more persons, who, to "avoid a lawsuit, settle their differences on such terms as "they can agree upon."

Here Clark and the company agreed upon a settlement, and having accepted the amount agreed upon as the balance due on the account, and in full settlement of all claims and demands embraced therein, such acceptance is as binding upon Clark, neither fraud nor mistake having intervened, as if such balance had been determined by judicial proceedings to which he was a party.

Kingsley vs. Melcher, 56 Hun, 547, 551.

In other words, Clark stood after that settlement in precisely the same position that he would have stood had he brought suit to recover the full amount claimed by him, to-wit: $223,091.12, and had recovered but $173,532.49, and the company had paid that amount into court, and he had received the same and satisfied the judgment.

The contention of opposing counsel that a settlement, once made, may afterwards be considered by the courts by piecemeal, and if it is ascertained that one or more of the items embraced within it, about which there was a dispute, were surrendered without the payment of anything thereon, the settlement as to such items will be disregarded and held not to be binding upon the party releasing, is supported by neither reason nor authority. The cases relied upon to support the contention of respondent are to the effect that when the *amount due* is a liquidated sum, the payment of a

part thereof, even though received in full satisfaction, is not a bar to the recovery of the balance. We have no fault to find with the rule announced in these cases. But they do not apply to or control this case. Here the amount due was not liquidated, but was in dispute; Clark contending that $223,091.12 was the balance due him, while the company insisted that $173,532.49 was all that was due him. The courts are uniform in holding that when the amount due is in dispute, or the liability of the debtor as to certain items of the account is in dispute, the payment of the amount conceded to be due, exclusive of the items in dispute, upon condition that the amount so paid shall be received in full satisfaction, is a sufficient consideration to support the settlement as a whole.

In *Fuller vs. Kemp*, 138 N. Y., 231, the plaintiff, a physician, sent the defendant an itemized bill showing 126 visits, for each of which a charge of $5 was made, and four consultations, at the rate of $10 each, making a total of $670. The defendant claiming that certain of the items were overcharges, made deductions from the bill to the amount of $270, and thereupon sent the plaintiff his check for $400 the amount which defendant conceded to be due. The plaintiff received the check and then sent his bill to the defendant charging $670 for services and crediting upon it $400, the amount received by the check. The defendant thereupon wrote the plaintiff to the effect that the check was sent him upon the express condition that it was a payment in full satisfaction of his bill, and notifying him either to keep the money upon the condition named or to return it by first mail. The plaintiff did not reply to this letter and after the expiration of nearly a year, brought suit to recover $270, the balance of his account, after applying the $400 received. The court held that there had

been, in law, an accord and satisfaction of the plaintiff's claim, and that no recovery could be lawfully predicated upon it. In this case, as in the case at bar, certain items of the account were disputed, and certain items were undisputed. The defendant conceded that $400 was due the plaintiff, and therefore paid him only the amount of the undisputed items, the same as was done in the case at bar, yet the court held that the dispute over certain of the items made the account an unliquidated one, and by receiving the amount of the undisputed items with notice that it was sent as a payment in full, the plaintiff could not recover the balance of his demand. In principle, this case is precisely like the case at bar.

In *Nassoiy vs Tomlinson*, 148 N. Y., 326, the plaintiff sold the property of the defendants for the sum of $30,000, upon which he claimed a commission of five per cent., amounting to $1,500. The defendants disputed the amount of plaintiff's commissions and sent him a check for $300, together with a receipt stating that the same was in full for commissions. The plaintiff received the check and receipt, but immediately wrote to defendants saying, "I don't know what you mean by sending me a check for $300. I want my five per cent. commission on the $30,000." No reply was made to this letter by the defendants and the plaintiff retained both the check and the receipt and some months afterwards called upon the defendants for the balance of his commissions, but they declined to pay anything further. Plaintiff never returned the check or the receipt but endorsed the check and drew the money on it and later on sent the defendants a receipt for $300, as part payment for his commissions, and notified them that he still claimed he was entitled to the balance $1,200. He

never returned or offered to return the amount of the check. The court held that there having been a dispute between the parties over the amount due, and the defendants having sent the plaintiff the amount which they conceded to be due and the plaintiff having received such amount with notice that it was sent to him in full payment of his commissions, there had been an accord and satisfaction, and that the plaintiff could not recover the balance of the commissions which he claimed he was entitled to. In this case the court lay down this rule which we contend is decisive of the case at bar.

A demand is not liquidated, even if it appears that something is due, unless it appears how much is due, and when it is admitted that *one* of *two* specific sums is due, *but there is a genuine dispute as to which is the proper amount*, the demand is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction.

In the *Nassoiy* case the plaintiff claimed that the defendants owed him the sum of $1,500 while the defendants claimed that they owed him but $300. (Opin., p. 330.) In the case at bar Clark claimed that the company owed him a balance of $223,091.12, while the company insisted that it owed him but $173,532.49. In the *Nassoiy* case plaintiff received a check for $300, with notice that it was sent to him in full payment of his commissions. He retained the check and used the money, *but did not sign the receipt which accompanied it.* In the case at bar the company sent Clark a statement of the account, showing how the balance of $173,532.49 was arrived at, together with a release in full for him to sign, stating that when it was signed and returned, a check for such balance would be sent to him. *Clark signed the release, returned it to the company*, received his check, endorsed it and got the money, and nearly six years afterwards brought this suit to

recover the difference between the balance claimed by him and the amount which he received in full settlement, being the balance conceded by the company to be due him. In the *Nassoiy* case the court held that the plaintiff, having accepted the amount which the defendants conceded to be his due in full satisfaction of his claim, notwithstanding he did not sign the release which was sent him, was bound by such acceptance and could not have further recovery. Here the defendant paid only the amount which he admitted to be due in any event. Nothing more was paid in compromise of the dispute between the parties, namely, whether the plaintiff should be paid 1 per cent. or 5 per cent. of the amount for which he sold the property. The plaintiff in any event was entitled to 1 per cent. commission. This was conceded by the defendant. In principle, therefore, this case is precisely like the case at bar, and we submit that the acceptance by Clark of the amount paid him in full satisfaction, and the execution and delivery of the release, bound him as effectually as the plaintiff was bound by the acceptance in the *Nassoiy* case.

In *Komp vs. Raymond*, 58 New York Supplement, 909, the parties entered into a contract by which the plaintiff agreed to render services in the Empire of Japan for the defendant for five years, at a specified yearly salary, a portion of which was to be paid monthly to him in Japan and the balance when contract was completed. The services were performed as agreed, and upon the final settlement a dispute arose between the parties as to the balance due, which depended upon the construction to be given to the contract, namely, whether the plaintiff was to be paid in Japanese money, called "yens," or the money of the United States. If the former, then the defendant was correct in its claim that only $1,250 was due; and if the latter, the

plaintiff was correct that there was over $6,000 due. The court held that there was an honest dispute between the parties as to the amount actually due the plaintiff. It appears, however, that the defendant declined to pay more than $1,250 in settlement, and gave the plaintiff a check for that amount, which he received, and thereupon he endorsed upon the back of the contract referred to the following:

"Received payment March 3d, 1896, $1,250; being in full payment of this contract, expiring January 1st, 1896, with salary, interest and allowances, besides closing his account to March 1st, 1896.

FREDERICK KOMP."

At the time plaintiff received the check and endorsed said receipt on the contract, he notified the defendant that if he did not pay him the balance, he would take the matter into court for settlement. Plaintiff used the check and applied the proceeds toward the reduction of the amount claimed by him under the contract, and then brought action to recover the balance. He had a verdict for the full amount claimed and from the judgment entered thereon the defendant appealed. The judgment was reversed, the court holding, following the rule laid down in *Nassoiy vs. Tomlinson, supra*, that there had been an accord and satisfaction and that the plaintiff could not recover, saying:

"We are of the opinion that, according to the plaintiff's own "testimony, an accord and satisfaction was so conclusively "established as to leave no question of fact for the jury. "The plaintiff's claim was unliquidated. A demand is not "liquidated, even if it appears that something is due, unless "it appears how much is due, and when it is admitted that "one of two specified sums is due, but there is a genuine "dispute as to which is the proper amount, the demand is "regarded as unliquidated, as applied to the subject of "accord and satisfaction. *Nassoiy vs. Tomlinson*, 148 N.

"Y., 326, 42 N. E., 715. Here the plaintiff claimed, as we "have already seen, that the defendant owed him something "over $6,000, while the defendant claimed that it owed "him but $1,250; and which one was correct depended "upon the kind of money that the plaintiff was entitled to re- "ceive under the contract. *Did, then, the acceptance by the "plaintiff of the offer to pay a sum conceded to be due satisfy "and discharge that claim?* We think it did, and that an "accord and satisfaction are evidenced by the statement "signed by the plaintiff, which statement cannot be contra- "dicted by parol evidence."

To the same effect is *Goodrich vs. Sanderson*, 55 N. Y. Supplement, 881. There the debit side of the account was conceded, the same as was conceded in the case at bar that Clark had earned a certain amount under his contract with the company. The dispute arose over the amount of the credits which should be applied toward the discharge of the debit side of the account, but in the settlement the whole amount of the credits claimed was allowed and the balance received in full settlement. Afterwards suit was brought to recover the amount of the credits which were in dispute, on the ground that the entire amount of the credits which were in dispute having been allowed, there was no compromise and therefore no accord and satisfaction. The court held that there could be no recovery; that the account was an unliquidated one and the fact that the plaintiff in settlement allowed the disputed items of the account in full, did not preclude an accord and satisfaction. The case of *Nassoiy vs. Tomlinson, supra*, is cited as authority.

In *Ostrander vs. Scott*, 161 Ill., 339, the plaintiff had an account against the defendant amounting to $5,282.58, the items of which were not disputed; but defendant claimed that he was entitled to be allowed the sum of $1,210 for

commissions on goods sold. Accordingly he sent his check for the balance, $4,072.58, to the plaintiff, at the same time notifying him that it was sent in settlement of his account in full, and if not accepted as such to return it. The check was retained by the plaintiff, and in due time he brought suit against the defendant to recover the amount withheld. *Here it will be seen that the whole amount in dispute was withheld and only the amount conceded to be due was paid.*

The court held that there could be no recovery and that an account cannot be considered as liquidated so as to prevent the payment of a less amount from operating as a satisfaction of the whole, where there is a controversy over the set-off and the amount of the balance is in dispute.

In *Tanner vs. Merrill*, 108 Mich., 58, the plaintiff sought to recover a certain amount which had been deducted from his wages by the defendants, his employers. The *amount* of his wages was not in dispute, but the *right* to make any deduction was questioned. The plaintiff received the amount of his wages, less the deduction, and gave a receipt in full, and afterwards brought suit, as Clark has done, to recover the balance on the ground that having received only the amount admitted to be his due, there was no consideration for the release as to the item that was disputed. The court decided that the plaintiff could not recover, holding:

"1. That the rule that a receipt of part payment, to be "effective in discharge of the entire debt, must rest upon a "valid consideration, is limited to cases where the debt is "liquidated by agreement or otherwise; and a claim, *any "portion of which is in dispute*, cannot be considered to be "liquidated within the meaning of the rule.

"2. That a receipt in full, given *upon payment of the "undisputed part of a claim*, after a refusal to pay another "part which is disputed, is conclusive as against the right of

"the creditor to recover a further sum, in the absence of "mistake, fraud, duress or undue influence."

Precisely the same question was involved in these cases that is involved in the case at bar.

The case of *United States vs. Child*, 12 Wallace, 232, was an appeal from the Court of Claims (*Child vs. United States*, 4 Court Claims, R. 185). In that case, in the Court of Claims, Child & Company were plaintiffs, claimants against the United States for the sum of $163,000, claimed as a balance due them on a sale of military stores to the government. It appeared that the chief quartermaster of the department of the West had purchased from the claimants military stores for the United States, the fair value of which was, *as the Court of Claims found*, $478,119.62, the price charged by the claimants, for which vouchers were given by the quartermaster. Payment of the vouchers was suspended by the War Department pending an investigation, and a military commission was appointed to investigate the claim, with others. The claimants' books and papers, vouchers, etc., were seized and produced before the commission. As the Court of Claims said:

"The commission examined them all; and at the conclu- "sion of its investigations endorsed upon the vouchers the "amount allowed by it, and ordered that the sum of $163,- "111 be deducted from the vouchers. The commission "also withheld all of the vouchers until the claimants signed a "receipt or agreement, *not under seal and without considera- "tion* (as the Court of Claims held), which provided that, "when the reduced amounts allowed by the commission "should be paid, the payment should be in full of all the "claimants' demands against the United States."

The Court of Claims further found that

"The claimants at the time of receiving payment made "no formal objection or protest, but were required to and "did sign a receipt, *not under seal and without consideration*,

"whereby they acknowledged having received such re-"duced amounts, *in full of the above account.*"

The Court of Claims also held, as matter of law:

"That the agreement or receipt, signed by the claimants "on receiving back their vouchers, was obtained and exacted "by duress of their goods, *and was wholly without considera-"tion and void;*" and further: "That the receipts re-"quired by the quartermaster at the time of payment, ex-"pressing upon their face that a less sum was received "than that due, *and being without consideration*, did not "operate as a release of the balance of the claimants' ac-"counts and where wholly void."

As to the matter of consideration, the United States Supreme Court, upon appeal from this decision (12 Wall., 243, per MILLER, J.), said: "Although it is found by the "court that these receipts were not under seal and were "without consideration, **the latter statement must have "some meaning not apparent to us, in view of the "other fact found also, that over $315,000 was paid to "the claimants on those accounts at the time they "gave the receipts.**"

That is, in effect, saying that the amount paid on signing the receipt, was a sufficient consideration for the release of the rest of their claims.

But, it is submitted that, when the commission appointed by the government had reported as to the amount which should be allowed on the claimant's demand, and the amount to pay it had been appropriated, the demand was liquidated at that amount; the government could not "in good conscience" refuse to pay it; nor could it have any "defense that could be urged in good faith, or with color of right" against its immediate payment, or to any action which might be brought to recover it.

In an earlier case (*United States vs. Adams*, 7 Wallace,

463), a similar ruling was made by the U. S. Supreme Court. The claimant, Adams, presented certain claims against the government; one for $83,500 for a *balance* due, for building certain mortar boats according to a specific contract; and another for $25,400, a balance claimed to be due, for building tugboats for the government under a contract. A commission appointed to investigate the claims, allowed $75,959.24 to be due upon the first claim, and $20,196 on the second; and gave *vouchers* therefor, which the government paid, and for which the claimant gave a receipt in full of all demands, *which he signed under protest.* (7 Wall., 466.)

The Court of Claims held that Adams was entitled to recover the whole of the contract price, for which judgment was given. But the United States Supreme Court held that the claimant could not afterwards recover for the balance of the contract price, (7 Wall., 467); that the acceptance of the payment of the amount of the voucher was a bar to any further demand against the government, (pp., 479-481, etc.); and that this was so, independently of the signing of the receipt in full; that *it was the acceptance of the money payment which constituted the accord and satisfaction.*

The doctrine of this case was affirmed by the Supreme Court in the *Child* case, 12 Wallace, 232, where it was held, that in neither case was the voluntary submission of the claim against the government to the commission appointed to investigate such claims, essential to bar a recovery. "*The bar in both cases rested upon the voluntary "acceptance by the claimants of a smaller sum than their "claim as a full satisfaction of the whole, and acknowledging "this in a receipt for the amount paid.*"

The court said: "We lay out of view in this case, as in "the Adams case, the receipts which they gave under pro- "test, in order to regain possession of their vouchers. But "we cannot disregard the finding of the court, that, after "Congress had appropriated the sums found due by the "commissioners * * * the claimants received the "amount so allowed, and signed upon each voucher a re- "ceipt whereby they acknowledged having received said "reduced amount *'in full of the above account.'*" (12 Wall., 243.)

And the court also said: "It is of no avail to urge that "the Court of Claims has found that the whole claim was "just and ought to be paid. After the compromise that "question was no longer open to inquiry. *It is the very "essence of such adjustments of disputed rights that the con- "test shall be closed.*" (12 Wall., 245.)

Both of these cases were again approved by the Supreme Court, in *United States vs. Justice* 14, Wall., 535, where it was held that "where a contractor with the United "States and the Government disagree as to what is justly "due to the contractor, and the question is referred by the "War Department to a commission to audit such claims, and "the commission finds a certain sum as justly due, and the "contractor receives that sum, he cannot sustain a claim for "a further sum, *even though he give no receipt in full or at "all.*"

The original claim was a liquidated sum for sale of guns at a contract price; but the amount due was said to be unliquidated because of claimed off-sets.

The court said, 14 (Wall., 547:) "After waiting until "the five years' limitation to actions of this kind *had nearly "expired*, he brings this suit to recover the balance of the "claim, according to the original contract price; and the "question is, can he maintain it?" After referring to the fact that the claimant took the sum found to be due him without protest, or "an intimation of dissatisfaction," the court said: "*He cannot afterwards be heard to say that he did "not accept this in full satisfaction of his demand.*" "It is "difficult to suppose that at this time he had any other "purpose than to acquiesce in the decision which was made.

"*If his purpose were different, why the long delay in insti-*
"*tuting suit?* It is hard to believe that the course subse-
"quently taken *was not the result of an afterthought.*"

The "*afterthought*" in this case first came to Clark in February, 1890, nearly two years after the settlement was made, and then went no further than a claim *in equity*, for the nut locks, as is shown by the following letter written by his representative to the president of the company.:

"Milwaukee, Wis., Feb. 26, 1899.

ROSWELL MILLER, Esq.,
Pres. C. M. & St. Paul Ry. Co.,
Milwaukee.

Dear Sir:

I beg to present for your consideration the following claims *in equity* that have grown out of the construction of your Kansas City extension, namely:

1st. For nut locks furnished, including freight to Ottumwa, Iowa; and putting the locks in place, $10,000. I beg to state that prior to the execution of the contract with Heman Clark and not until track laying was commenced, did the *question* of nut locks come up. They are not referred to in the contract in any way, and the claim is made on the ground that this is an extra.

4th. In addition to this, interest on $35,000 for two years, held by you against unadjusted claims growing out of construction. Respectfully yours,

W. W. HEGEMAN."

(*Rec., p. 308.*)

It will be observed that no claim, even "*in equity*" was then made for the $40,000 which Clark allowed the company in settlement for the overtime penalty, although all the facts and circumstances in relation thereto were as well known at the time the settlement was made as at the present time. The item of interest for two years on $35,000 referred to in the letter, relates to the interest on the $40,000 which was reserved by the company to meet the claims of sub-contractors and others, the full amount of

which was afterwards accounted for by the company to Clark, as was provided in the release which Clark signed when the final payment was made to him. (*Finding 14, Rec. p. 116.*

See, also, *United States vs. Clyde*, 13 Wall., 35, and *Mason vs. United States*, 17 Wall., 73, in which the court says of a similar settlement that "it is a plain case of "voluntary settlement between the parties, *which all courts "hold is final and conclusive.*"

In all of these cases the amount paid was only the amount admitted to be due by the government. It paid nothing but what it admitted it was obligated to pay; and the claimant received nothing for the release of the balance of his claim, except the payment of the amount which the government admitted to be due. It is reasonable to assume that the only items about which there was any real controversy in the *Child* case were those which comprised the $163,111, the amount in dispute; yet the court must necessarily have held that the balance due on the account was in dispute because of the dispute over certain of the items of the account, and therefore the account as a whole was unliquidated, and the acceptance of the amount which the government conceded to be due, on condition that it was paid in full of all demands against it, precluded a recovery of a further sum.

Under all the authorities, an account cannot be said to be liquidated when any item thereof is in dispute, and when such is the case, a release in full, even though it is given upon payment of the amount of the undisputed items of the account only, is conclusive as against the right of the creditor to recover all or any portion of the amount of the disputed items, unless such release

was procured by fraud or was the result of mutual mistake.

Any other rule than this would require that there must exist a dispute over each item of an account in order to make it a disputed and an unliquidated account. This is not the rule. If but a single item of an account is disputed in good faith, the balance due is necessarily in dispute, and consequently the account or demand is unliquidated. And under all the authorities, where neither mistake nor fraud intervenes, the acceptance of any part of the demand as a payment in full, even though it but equals the amount of the undisputed items, precludes further inquiry, as well as further recovery.

By reading the opinion of LACOMBE, J., who wrote the principal opinion, it will be seen that he applied the following rule to and made it decisive of this case:

"Payment by a debtor of a *liquidated* amount, presently "due and to which he has no defense that can be urged in "good faith or with color of right, is not by itself a sufficient "consideration to sustain a release by the creditor of other "*unliquidated* claims against the debtor." (Rec., p. 525.)

The error which the learned judge made, and which pervades the entire opinion, was in assuming that a part of the account was liquidated, and the remaining part unliquidated. In other words, that the account, with the exception of the two items of $40,000 and $9,558.63 was liquidated, and showed a balance of $173,532.49 "presently due," and therefore the payment of that balance constituted no consideration for the release of the claims or items embraced within the account which were disputed, and unliquidated. There is no finding that the parties had liquidated the account between them prior to the liquidation which was made by the settlement of March 9, 1888, or

that the account had in any manner been so adjusted that it was liquidated as to certain items and unliquidated as to certain remaining items. On the contrary, it was expressly found by the *sixteenth* and *eighteenth* findings of fact:

"That no other final settlement of the accounts under "said contract had been had between the plaintiff and the "defendant *at the time* that the said last-mentioned paper "(the instrument of settlement contained in the thirteenth "finding of fact) was signed and delivered."

"That no account was ever, otherwise than by said paper "and the receipt of said money (meaning the instrument of "settlement contained in the thirteenth finding of fact), "stated of the transactions under and connected with said "contract between the plaintiff and the defendant."

So that it affirmatively appears that until the account of March 9, 1888, was rendered to Clark and accepted by him, there had been no liquidation of the account between him and the company. The liquidation then made was a liquidation of the entire account. There was no partial or piecemeal liquidation. And the record will be searched in vain for a single fact or circumstance showing or tending to show that a portion of the account was liquidated and a portion unliquidated. While it is true that the dispute was confined to the two items above mentioned, yet there not having been any statement of the account between the parties, or any agreement as to the *balance due* until the statement and settlement of March 9, 1888, it is manifest that such dispute did not have the effect of adjusting the account, so that prior to such settlement that portion of the account which was not disputed was liquidated, and that portion of it which was disputed was unliquidated. Any such inference as this does violence to the facts found by the *thirteenth, fourteenth, sixteenth and eighteenth* findings of fact and to the conclusion of Judge LACOMBE.

"There is nothing in the findings to show that plaintiff "signed this receipt improvidently or without due consid- "eration, *nor that it failed in any way to set forth accurately "the agreement entered into between the parties on that day.*"

It is apparent from the instrument of settlement itself that the "*agreement entered into*" was an agreement to liquidate the balance due on the entire account, and not the balance due on the undisputed items only, and that prior to the date thereof there had been no liquidation, either partial or otherwise, of the account between the parties; that up to that date the account was an unliquidated, unsettled account. It is equally apparent that on that date there was no partial or piecemeal adjustment or liquidation, but that the account was liquidated as a whole. An account is not liquidated until the balance due is agreed upon by the parties or is fixed by operation of law. To liquidate an account is to adjust it, to settle it; and until the exact balance due is agreed upon, there can be no liquidation of an account.

Century Dictionary.

Abbott's Dictionary of Terms & Phrases, Vol. 2, 50.

13 Am. & Eng. Ency. of Law, 845, 846.

Now, it is found by the *sixteenth* and *eighteenth* findings of fact that no account was ever stated between Clark and the company, or final settlement made of the transactions under and connected with the contract, other than that made and stated by the instrument of settlement of March 9, 1888. By that instrument, and not otherwise, Clark and the company agreed upon the balance that was due on the account. This was the only agreement on the subject. Prior to that date the account was an unliquidated one. On that date it became a liquidated one, not merely

as to the undisputed items thereof, but in its entirety. So that, under the facts, the rule laid down by Judge LACOMBE, as above stated, has no application to this case. The court below disposed of this case upon the assumption or theory that, prior to the settlement of March 9, 1888, a portion of the account had been settled and adjusted between the parties, so that it showed a balance of $173,532.49, and therefore such balance was a liquidated demand, and that the remaining portion of the account comprising the items of $40,000 for overtime forfeiture and $9.558.63 for nut-locks, was left in dispute and was an unliquidated demand; therefore the payment by the company of the liquidated amount was no consideration for the release of the claims that were unliquidated. We respectfully submit that herein the court below erred.

This case may be differently and yet more simply stated. To apply toward the payment of the amount which Clark had earned in the construction of the rail-road, the company claimed credit for the amount which it had paid for the nut-locks furnished to him in the construction of the road, $9.558.63, and the amount which he had agreed to allow it by way of forfeiture in case the road was not completed by June 1, 1887—$40.000. Clark, by accepting the settlement offered him in the statement of account of March 9, 1888, allowed these credits; and neither fraud nor mistake having intervened, such allowance is as binding upon him as a payment would have been had the company presented these claims to him and he had paid them in cash. He stands in this action precisely as he would stand had he paid the company $49.-558.63 in cash in satisfaction of these claims, and had then brought suit to recover back. It is needless to add that, unless the payment so made was obtained by duress or

fraud, or was made by mutual mistake, the amount thereof cannot be recovered back.

In other words, the findings of fact show that the company paid Clark the full amount which he earned in the construction of the road, $3,895,798.79, and the amount allowed him for certain material, rebates, etc., $34,598.90, making a total of $3,930,397.69, and *$521.75 more.* (*Findings 13 and 14, Rec., pp. 113-16, and 11 Rec., 136.*) The question involved in this case is the same as would have arisen had Clark held the company's note for $100, and in payment thereof the company had tendered him $75 in cash and a claim for materials furnished him amounting to $25. and he had allowed the claim, received the cash and surrendered the note, and then had brought suit to recover $25, the balance alleged to be due on the note. Neither fraud, duress nor mistake having intervened, it must be conceded that no recovery could be had, and that even a finding of fact or a conclusion of law that Clark was not legally liable for the materials for which the claim was made would not change the result.

But this is not all. By turning to the instrument of settlement, it will be observed that in addition to the amount earned by Clark under the contract, as shown by the final estimate of the chief engineer of the company, there was credited or allowed to him in the settlement the sum of $34,598.90 for material sold by him to the company and for certain rebates and other matters of that description. By turning to the contract (Rec., pp. 146-188), and the final certificate and estimate of the chief engineer (Rec., pp. 127-135), it will be seen that this item of $34,598.90 represented no part of the work specified under the contract, nor extra work, nor materials ordered by the company, and that it was not included in the contract or in the

certificate and final estimate of the chief engineer. It was, therefore, not liquidated by either the contract or the chief engineer of the company. Speaking of this item, LACOMBE, J., said:

"Therefore, it was not liquidated by the original contract, "nor by any action of the chief engineer thereunder. In- "deed it is plain to a demonstration from the findings that "the item in question was not included either in the original "contract or in the extra work, and must represent an addi- "tional and independent contract of sale." (Rec., p. 533.)

Hegeman, Clark's representative and principal witness, in speaking of this item when testifying, said:

"I understand that was a trade outside of the contract; that it was for materials and stuff taken off our hands, like ties, and possibly rails, spikes and bolts which was left over." (Rec., p. 261.)

It is apparent that this item related to matters entirely outside of the accounts under the contract for the construc- tion of the road, and that it was injected into the accounts and made a part of the statement of account on which the settlement of March 9, 1888, was made in order that the settlement then made would be a full and final settlement of all matters and transactions had or pending between the parties. We contend that the allowance of this large credit to Clark in the settlement was a sufficient consideration to support the settlement independently of the consideration hereinbefore stated.

In the opinion of LACOMBE, J., in passing upon this question, it is said:

"This sum is by the statement of account set forth in such "receipt credited to Clark, and is included in the $173,532.49 "paid to him upon his signing such receipt. From what has "been said before, it is plain that, if at the time of the trans- "actions relied upon as showing an accord and satisfaction, "this sum of $34,598.90 so allowed to Clark represented an

"*unliquidated* item, the amount of which he would have to "establish by evidence in case he had sued to recover it, its "allowance to him upon the settlement of March 9, 1888, "would be a sufficient consideration to uphold that settle- "ment against him as an accord and satisfaction of all his "claims." (Rec., p. 532.)

There is no finding, whatever, that said amount of $34,598.90 had ever been agreed upon or liquidated by the parties in a manner that would have entitled Clark to recover that amount from the company as an independent item, otherwise than by the statement of it in the account preceding, and which formed a part of the receipt and acknowledgment of satisfaction which Clark executed and delivered to the company March 9, 1888; nor is there any finding showing or tending to show that the company would have allowed that credit to Clark except as an item in that account, in which he should likewise allow credit to the company for the amount of the charge for nut-locks and forfeiture. The learned judge, however, seems to hold that because of the fourteen finding of fact, "*that said receipt and paper contained an accurate, truthful and undisputed account of all dealings between said parties, except in the matter of the $40,000 deducted for time forfeiture, and the $9,558.63 for nut-locks*," he must assume that the referee was satisfied from the testimony that the prior transactions between the parties were such that this sum was no more open to dispute than was the sum of $3,895,798.79, to which the chief engineer had certified. The learned judge also stated that it does not appear in the findings by what process this item of $34,598.90 was so liquidated. (Rec., p. 533.)

It thus appears that, but for the conclusion that this item of $34,598.90 had been liquidated by the parties prior to

the statement of account and settlement of March 9, 1888, the court below would have held that the allowance thereof as a credit to Clark would have been a sufficient consideration to uphold the settlement. Was the court right in this conclusion? We think it can be shown to a demonstration that it was not. In holding that, because it is found by the *fourteenth* finding of fact that the statement of account upon which the settlement was made, contained an *undisputed* account of all dealings between the parties, excepting the $40,000 deducted for time forfeiture and the $9,558.63 for nut-locks, Clark and the company had, prior to the time such statement of account and settlement were made, agreed that the value of the materials, rebates and other matters of that description was $34,598.90, and that the company would buy such material and allow the rebates at that sum, the court below assumed, without any finding of fact to support it, that there had been prior transactions between Clark and the company which effected a liquidation of that item. For the learned judge says:

"By what process it was so liquidated does not appear in "the findings. We must take his finding (meaning the "fourteenth finding of fact), therefore, as conclusive upon "the question, *and assume* that either by agreement for a "price in advance, or subsequently by entering into some "binding agreement as to the sum to be paid, the defendant "had lost its right to throw the plaintiff into court as to that "item." (Rec., p. 533, 534.)

Herein the court below seriously erred.

1. The assumption is contrary to the finding and conclusion of the referee, to-wit: "That no account of the transactions under the contract, *and of the claims sued on in this action*, was ever had or stated between the parties to this action, otherwise than by said receipt or paper of March 9, 1888." (Rec., p. 119.)

This finding, or conclusion, is neither mentioned nor referred to in either of the opinions of the court below.

By referring to Subdivision 6 of the first cause of action set forth in the amended complaint (Rec., p. 33), it will be seen that this item constituted a part of "*the claims sued on in this action.*" It therefore affirmatively appears, that otherwise than by the statement of account and settlement of March 9, 1888, there had been no account had or stated between Clark and the company, whereby the item of $34,598.90 had become a liquidated demand. The value of the materials, rebates, and other matters covered by this item, must, therefore, not only *not* have been agreed upon prior to that date, but the company had not, prior to that time, obligated itself to buy such material or allow such rebates. It was not enough that the value of this material and these rebates, and other matters, should have been undisputed, for these matters did not pertain to the contract for the construction of the road, nor to the accounts between the parties arising thereunder, and, therefore, the fact that the items represented by this amount were undisputed imposed no obligation upon the company to purchase the material or allow the rebates, or to allow the amount thereof as a credit to Clark in the adjustment and settlement of the accounts under the contract. And without the obligation to purchase such material and allow such rebates, the fact that the value and the amount thereof were undisputed was of no advantage or value to Clark.

We must, therefore, look to the statement of account upon which the settlement of March 9, 1888, was made, as the "*process*" by which this item was liquidated, and the amount thereof allowed as a credit to Clark in effecting that settlement; for otherwise than by that instrument, receipt or paper there was no account had or stated between

the parties of the transactions under the contract *and of the claims sued on in this action*, nor was there any obligation incurred by the company to purchase such material or allow such rebates, or to credit the amount thereof to Clark in the settlement of the accounts under the contract or arising out of the construction of the road.

That statement of account, in the absence of any finding to the contrary, we submit, fully sustains our position that this large credit was allowed Clark as an element of consideration in the adjustment and settlement of the accounts under the contract.

2. But if the findings are such that resort must be had to assumptions, we submit that whatever assumptions are made should be in favor of the settlement and not against it. The law favors settlements and lends every presumption to support them. The presumption always is that they were made in good faith, without fraud or mistake, and that a consideration sufficient to support them existed. The burden, therefore, was with Clark to show, not only that the value of the material and rebates had been agreed upon at $34,598.90 prior to the rendition of the statement of account of March 9, 1888, but that prior to that date the company had bound itself to buy the material and allow the rebates at that sum. If, therefore, the findings are such that the court cannot determine from them when or by what process the item in question was liquidated, then the burden which the law cast upon Clark was not met by him, in which event the court is at liberty to presume, and should presume, that the company would not have allowed that credit to Clark, except as an item in the account in which he should in turn allow

credit to the company for the amount claimed by it for nut-locks and forfeiture, and that the settlement which was made was induced by the allowance to Clark of that item.

The court below, it is submitted, applied the wrong rule in this case, and instead of seeking to find some ground to sustain the settlement made by the parties themselves, and acquiesced in by Clark for nearly six years before the suit was brought, seems rather to have sought after some ground upon which to overthrow it:

"No practice could be more dangerous than that of "opening accounts which the parties themselves have ad- "justed on suggestion supported by doubtful or by only "probable testimony. * * * The whole labor of proof "lies upon the party objecting to the account, *and errors "which he does not plainly establish cannot be supposed to "exist.*"

Chief Justice MARSHALL in *Chappedelaine vs. Dechenaux*, 4 Cranch., 309.

POTTER, J., in *Jaffray vs. Davis*, 124 N. Y., 168, said:

"They (the courts) have seemed to seize with avidity "upon any consideration to support the agreement to accept "the lesser sum instead of the larger, or, in other words, to "extract, if possible, from the circumstances of each case, a "consideration for the new agreement, and to substitute "the new agreement in place of the old, and thus form a "defense to the action brought upon the new agreement."

ELLISON, J., in *Henson vs. Stever*, 69 Mo. App. Rept., 136, 141, said:

"The courts regard the rule preventing a creditor from "making a valid contract to take a less sum of his debtor "in discharge of a greater as technical and unreasonable, "and they are eager to find some element in the transac- "tion which can be held to be a consideration."

NELSON, J., afterwards one of the justices of this court, in *Kellogg vs. Richards*, 14 Wend., 119, said:

"The rule that the payment of a less sum of money, "though agreed by the plaintiff to be received in full satis-"faction of a debt exceeding that amount, shall not be so "considered in contemplation of law, *is technical and not "very well supported by reason. Courts, therefore, have "departed from it on slight distinctions.*"

Applying the doctrine of these cases, we submit that the allowance by the company to Clark of the large credit of $34,598.90 in the adjustment and settlement of the accounts under the contract, was a sufficient consideration to support the settlement, independently of the consideration which the dispute between Clark and the company over the items of $9,558.63 for nut-locks and $40,000 for forfeiture furnished, which items were embraced in the accounts under the contract, and which dispute we insist also furnished an undoubted consideration for the settlement.

II.

The court below erred in holding that the question, whether there was any evidence in the record to sutain the findings that the defendant company in June, 1888, wrongfully took possession of certain lumber belonging to the plaintiff and converted it to its own use, was not reviewable.

The findings are as follows:

That in or about the months of March and April, 1888, the plaintiff was the owner of 97,000 feet B. M. bridge timber then in the yard of the defendant at Chillicothe, and along the line of the railroad.

That the said lumber did not conform to the standard of the defendant, and was not purchased by the defendant from the plaintiff, or allowed in the final certificate of the chief engineer, under the contract in this section to the plaintiff.

That in and about the month of June, 1888, the defendant took possession of the said lumber and converted the same to their own use without assent or knowledge of the plaintiff.

That the value of the said lumber at the time of the taking in June, 1888, was $2,425. (Rec., p. 117.)

The record will be searched in vain for any legal evidence to sustain these findings.

The witnesses who testified in behalf of Clark, were *Hegeman, Van Aiken, Russell* and *House.* Their testimony will be found at pages 246, 247, 375, 278, 380, 384, 336 and 388 of the printed record.

It appears from Hegeman's testimony (Rec., p. 375), that he never saw any of the timber in question after March 1, 1888, not having been at Chillicothe after March until August or July, 1888; *that he had no personal knowledge of what use had been made of the timber or what was done with it.* In 1890 he wrote to Whittemore, the chief engineer of the company, *stating that he was informed*, that at the time of the washouts south of Chillicothe, during the Summer of 1888, this bridge timber was used by the company, and asked him to investigate the matter. (Rec., p. 246.) Whittemore did so, and reported to Hegeman that he could not find that there had been any timber used by the company that belonged to Clark. (Rec., p. 311.)

VanAiken, who was one of Clark's sub-contractors, tes-

tified that there was some bridge timber left over in March, 1888, and that when he went back there the following Summer, he did not find it. He says, however, "*I haven't any idea as to what became of this timber, from personal knowledge, only from hearsay.*" (Rec., p. 278.)

Russell testified, that the last time he was at Chillicothe, was in December, 1887, or January, 1888 (this was six months before the timber is alleged to have been taken); that there was some timber scattered along the road, but that he did not know to whom it belonged; nor could he say how much of it there was, *nor what use was made of it, as he was not there at the time.* (Rec., p. 384.)

House, the only other witness for Clark, testified that he was roadmaster for the company, and was located at Chillicothe, and had to do with repairing the washout for the company in June, 1888; that the lumber to make the repairs came from the Chillicothe yard; *that he did not know whose lumber it was that was used;* whether Van-Aiken's, the sub-contractor, or Clark's, or the railway company's; *that the railway company had a large amount of lumber at the Chillicothe yard which was used; that he remembered distinctly that he was notified not to take any lumber or timber that was said to belong to VanAiken, the contractor.* (It was the VanAiken lumber that it is claimed was taken by the company.) House closes his testimony by saying: "*I do not know, as a matter of fact, whether that* (referring to the timber in question) *was taken or not.*" (Rec., pp. 386-388.)

On behalf of the company, Whittemore, its chief engineer, testified, that in March, 1890, he received a letter from Hegeman, Clark's representative, stating *that he had been informed* that the company had used certain bridge timber

belonging to Clark, in repairing a washout in June, 1888, and asking that the matter be investigated; that he immediately caused an investigation to be had, and reported to Hegeman; that he was unable to find that any timber had been used by the company which belonged to Clark. (Rec., p. 311.)

Kuehnle, a witness for the company, testified that he was foreman of the Chillicothe yard in 1888, and selected the lumber which the company took off of Clark's hands at the close of the work (which was the lumber that was included in the item of $34,598.90 allowed as a credit to Clark in the settlement); that this lumber was separated and piled in the Chillicothe yard of the company in the east end of the yard; that there was a lot of lumber that the company did not accept, which was left in the south or lower end of the yard. He says:

> "That consisted of some bridge timber and bridge ties, and some poor cull ties. I understood that some of Clark's foremen sold some of it to private parties, farmers and some people that lived around the city. It was taken away during that same Winter and up until Spring. I was there in June, 1888. I remember the time of the washout near Chillicothe in June, 1888. * * * None of this lumber that was set aside there that was not taken by this company from Mr. Clark was used at the time of that washout, or in any of the washouts. We used the company's lumber. We were particular about that. There was no more of Mr. Clark's lumber there at that time. It had all been taken away before that—it was all gone. I am quite sure none of it was used for any purpose connected with that washout or any of these washouts." (Rec., p. 342.)

He says, further:

> "This lumber was not there before the washouts. I could not give the names of the foremen that sold this lumber. There was one man named Clark. I seen him.

He hauled some stuff away; he did not haul it—he had it hauled. He was a foreman of Clark's. I do not know his first name." (Rec., p. 344.)

And further:

"The company did not sell any of that lumber that was in the south end of the yard. They did not haul it away or have it hauled away. They did not use any of it." (Rec., p. 345.)

Re-cross examination by Mr. Rose.

"They got the material that was used in repairing these washouts out of the general yard. That was on the other side of the coal shed at Chillicothe. I saw them haul it away in the cars, and assisted them in loading it." (Rec., p. 345.)

There was therefore no evidence whatever showing or tending to show that any lumber belonging to Clark was used by the company in repairing the washout in June, 1888, or at any other time. On the contrary, it was affirmatively shown by Kuehnle, who was at Chillicothe during the washouts of June, 1888, and assisted in shipping the lumber which was used in repairing such washouts, that none of the lumber so used belonged to Clark or was taken out of that portion of the yard where his lumber was piled, but that the lumber which was used was all taken from the east end of the yard where the company's lumber was piled and none but the company's lumber used. The findings therefore are not only wholly unsupported by any competent evidence, but are contrary to the testimony produced by the company, which stands uncontradicted.

A finding without any evidence whatever to support it presents a question of law and is an error of law, and has always been regarded as a ruling upon a question of law.

Booth vs. R. R. Co., 67 N. Y., 593.
Pollock vs. Pollock, 71 N. Y., 137, 146.
Halpin vs. Ins. Co., 118 N. Y., 165, 170.

A similar rule prevails in the courts of the United States, where it is held to be the duty of the court to direct a verdict, one way or the other, where there is no evidence to sustain a verdict to the contrary, or where such a verdict would be set aside, if rendered.

Improvement Co. vs. Munson, 14 Wall., 447, 448.

Pleasants vs. Fant, 22 Wall, 116.

R. R. Co. vs. Houston, 95 U. S., 697, 703.

Griggs vs. Houston, 104 U. S., 553.

Schofield vs. C. M. & St. P. Ry. Co., 114 U. S., 615.

Dwight vs. Ins. Co., 103 N. Y., 358, 360.

Reynolds vs. Great Northern Ry. Co., 69 F. R., 810.

If the facts are found by the court they are conclusive only in case there is a conflict of evidence, or if there is *any* evidence to sustain it; and the Appellate Court will examine the evidence for the purpose of ascertaining whether there is any such evidence.

Lancaster vs. Collins, 115 U. S., 222.

Runkle vs. Burnham, 152 U. S., 217, 225.

Beuttel vs. Magone, 157 U. S., 154, 158.

Chrystie vs. Foster, 61 F. R., 551 (9 C. C. A., 606).

Fisher vs. U. S. Natl. Bank, 64 F. R., 710, 12 (26 U. S. App., 448, 452).

Merion vs. Magone, 70 F. R., 776.

Magone vs. Origet, Id., 778.

Kirtz vs. Peck, 113 N. Y., 222.

B. S. Co. vs. M. C. R. Co., 134 N. Y., 20.

The question whether there was any legal evidence to support the findings and the judgment entered thereon as

to the item of $2,425 for bridge timber alleged to have been wrongfully converted by the company in June, 1888, is raised by the refusal to find as requested, that the company did not in the month of June, 1888, or at any other time, wrongfully or otherwise take possession of any timber belonging to Clark, or convert the same to its own use (Request No. 37; Rec., p. 211), the exception thereto, (Exception No. 27; Rec. p. 463; also Exception No. 17; Rec., p. 456) and the several assignments of error, particularly the *seventy-fourth* assignment of error (Rec., p. 501). *These exceptions and assignments of error were based expressly upon the ground that there was no proof in the case to sustain the findings that the company wrongfully or otherwise took or appropriated the timber in question.* A question of law was therefore presented. LACOMBE, J., in disposing of these findings of fact, said:

"Indeed, the only objection urged by plaintiff in error is "that there was not competent evidence to sustain the find-"ings of fact; *but that question is not reviewable here.*"(Rec., p. 535.)

We respectfully submit, that if there was no competent evidence to sustain these findings, and that question was saved by proper requests, exceptions and assignments of error, as it clearly was, it was reviewable by the court below and is reviewable by this court.

III.

The court below erred in holding that it was proper to allow the plaintiff to amend his complaint on the trial against defendant's objection by adding thereto a cause of action sounding in tort, and recover thereon.

Irrespective of the fact whether the company did or did not take and use any timber which was left over by Clark or his sub-contractors, in repairing a washout or otherwise, in June, 1888, or whether there is or is not any testimony to sustain the findings that were made on that subject, Clark should not have been allowed to recover for such timber in this action.

The claim for such timber was originally included in the second cause of action stated in the original complaint, which was for work performed and material furnished "in excess of that called for by the contract" and is specified in the bill of particulars as:

> "97,000 ft. B. M. bridge timber taken and used by the company during washout south of Chillicothe, about June, 1888, $2.425." (Rec., p. 17.)

This claim, as stated, does not come under the head of any material furnished in the construction of the road under the contract not called for by the contract, but is in relation to a matter entirely outside of the contract, and which, as alleged, arose after the work was all completed, and there had been a final settlement between the parties of all matters arising under the contract or out of the construction of the road.

It is evident, from this statement of the claim, that it had nothing to do with the cause of action stated in the original complaint as extra work or material furnished in the

construction of the road under the contract, but was matter outside of it. Counsel for Clark, realizing this situation of the claim, sought by the amendment to the complaint to add a cause of action that the company had *wrongfully* and without the knowledge or consent of Clark taken possession of such lumber and *converted* the same to its own use. The amendment by which this cause of action was inserted in the complaint was allowed during the trial after the plaintiff had rested, and against defendant's objection that no amendment could be allowed which changed the cause of action from one cause to another, and an inconsistent one, or which changed a cause of action on contract to one in tort, or which added inconsistent allegations. (Rec., pp. 281, 282.) The objection was overruled, the amendment allowed as the *fifth* cause of action (Rec., pp. 36, 281), and defendant excepted. The objection on the ground stated, and the exception to the overruling of the objection sufficiently raised the question and saved defendant's rights in the matter. This action is presented and questioned in and by the *seventeenth* assignment of error. (Rec., p. 482.)

As included, or embraced in the second cause of action of the original complaint, this claim was disallowed, as it was found by the 12th additional finding of fact (Rec., p. 136), that the company did not require Clark to furnish any materials not required and agreed to be furnished by him by the terms and provisions of the contract, except or otherwise than as stated and allowed for in the final estimate of the chief engineer; nor did he furnish any material not required by the contract, except as allowed for as aforesaid.

It is a well-settled rule that a cause of action in tort which is the nature of the cause of action stated in the *fifth*

cause of action of the so-called amended complaint, cannot be united with causes of action on contract.

Raynor vs. Brennan, 40 Hun., 60.
Keep vs. Kaufman, 56 N. Y., 332.
Miles vs. Suydam, 64 N. Y., 173.
Miller vs. Tuska, 87 N. Y., 166.
Bowen vs. Mandeville, 95 N. Y., 237.

The cause of action stated in the *fifth* cause of action is certainly one founded in tort; for it is alleged *that the company, without the knowledge and consent of Clark, wrongfully took possession of certain timber and converted the same to its own use, to his damage in the sum of $2,425.*

Considered as two separate causes of action in the same complaint, without regard to the fact that the cause of action for conversion of the timber was embodied in the complaint by an amendment allowed upon the trial, but treated as if originally in the same complaint, the two causes of action, one for the recovery of the value of the lumber as extra material furnished, and the other for the value of the lumber as *wrongfully converted* by the company to its own use, are inconsistent with each other; one as an action on contract, and the other as an action in tort. The plaintiff must elect upon which cause of action he will proceed; he cannot have both.

Southworth vs. Bennett, 58 N. Y., 569.
Stewart vs. Huntington, 124 N. Y., 127.

No amendment to a complaint can add what amounts to a new cause of action. Where the two causes of action

are distinct, it is not competent at the trial to make the substitution of one for the other.

Ross vs. Mather, 51 N. Y., 108.
Dudley vs. Scranton, 57 N. Y., 424.
Price vs. Brown, 98 N. Y., 338.
Freeman vs. Grant, 132 N. Y., 22-29.

Where a party has an election between two inconsistent remedies he is confined to that which he first chooses, and cannot change. The remedies are not concurrent, and the choice between them once made, the right to follow the other is forever gone.

Sanger vs. Wood, 9 Johns. Cas., 416.
Littlefield vs. Brown, 1 Wend., 398, and 11 Wend., 467-470.
Morris vs. Rexford, 18 N. Y., 552.
Rodermund vs. Clark, 46 N. Y., 354.
Goss vs. Mather, Id., 689.
King vs. Ealvin, 4 Hun., 258.
Stenfield vs. Simonson, 44 Hun., 29.
Fowler vs. Savings Bank, 113 N. Y., 450.
Bach vs. Tuck, 126, N. Y., 53.

That which plaintiff could not maintain separate actions for, he cannot unite in one and the same complaint as separate and distinct causes of action.

Bank vs. Beale, 34 N. Y., 473.
Cobb vs. Hatfield, 46 N. Y., 536.
Kennedy vs. Thorpe, 51 N. Y., 174.
Conrow vs. Little, 115 N. Y., 387.
Terry vs. Munger, 121 N. Y., 161.

A party cannot adopt one remedy as to a part and an in-

consistent remedy as to another part of the same transaction.

Gardner vs. Ogden, 22 N. Y., 327-340.
Strong vs. Strong, 102 N. Y., 69.
Scarf vs. Jardine, 7 App. Cases, L. R., 345.
Riley vs. Savings Bank, 36 Hun., 573.
Hentz vs. Havemeyer, 15 Appl. Div., 357.

In disposing of this question, the court below, by LACOMBE, J., said:

"Having waived the tort, and elected to sue on implied "contract, plaintiff could quite properly include this cause "of action in his complaint." (Rec., p. 535.)

The force of this statement is not perceived when it is considered that the averments stating this cause of action conform with the averments that are usually found in the forms prescribed for declarations in trover. So far as the record shows, there is nothing to indicate that the plaintiff had waived the tort and elected to sue on implied contract.

IV.

The judgment should be reversed and the cause remanded, with directions to the circuit court to enter judgment in favor of defendant company for the amount of its counter-claim, to-wit: $521.75, as found by the fourteenth and eleventh findings of fact. (Rec., pp. 116, 136.)

If the judgment herein shall be reversed *in toto*, as we contend it should be, then the reversal should be with directions to the Circuit Court to enter judgment in favor of the company for the sum of $521.75, with interest from June 30, 1888, and costs; if it shall be reversed only in part, as

to the two items of $9,558.63 and $40,000, embraced in the *first* cause of action, and affirmed as to the item of $2,425, embraced in the *fifth* cause of action, then the cause should be remanded, with directions to the Circuit Court to enter judgment in favor of the company, dismissing the complaint as to all of the causes of action embraced therein, excepting the fifth cause of action, on which judgment should be entered in favor of Clark, for the sum of $2,425 and interest thereon from June 30, 1888, less said sum of $521.75 and interest thereon from said date.

The counter-claim in favor of the company for $521.75 arose in this wise: By referring to the instrument of settlement of March 9, 1888, it will be seen that Clark consented that $40,000 should be retained by the company from the amount due him, for the purpose of paying certain claims then pending against the company and from which Clark had agreed, in his contract for constructing the road, to save the company free and harmless, the company agreeing to account for the $40,000. (*This $40,000 should not be confounded with the $40,000 which was allowed to the company under the supplemental contract, by which that amount should be forfeited if the road was not completed by June 1, 1887.*) Subsequently the company paid out in settlement of claims the whole of said $40,000 and $521.75 more, therefore the counter-claim for that amount. (See *fourteenth* and *eleventh* findings of fact. Rec., pp. 116, 136.)

The findings of fact, particularly the thirteenth (Rec., p. 113), the twenty-second, twenty-third, twenty-fourth and twenty-fifth (Rec., pp. 203-207), and the twelfth (Rec., p. 136), entitle the company to a judgment dismissing the complaint as to all of the causes of action, excepting the fifth,

which relates to the item of $2.425 for bridge timber alleged to have been taken by the company in June, 1888, and for judgment in its favor for the amount of the counter-claim set up in its answer, for $521.75, with interest and costs.

The state of the record is such that if a reversal of the judgment is ordered in whole or in part, a trial *de novo* should not be ordered, but the cause should be remanded to the Circuit Court with directions to enter such judgment as this court shall decide is warranted by the record. This it has power to do by *Section 701 of the Revised Statutes of the United States*, which provides that this court may modify or reverse any judgment of the Circuit Court brought before it for review, or may direct such judgment, decree or order to be rendered, or such proceedings to be had as the justice of the case may require. This was done in

L. M. & C. Ry. Co. vs. United States, 108 U. S., 277-280; and in

C., M. & St. P. Ry. Co. vs. Hoyt, 149 U. S., 1-17.

We also submit that if the judgment shall be reversed only as to the two items of $9,558.63 and $40,000 embraced in the *first* cause of action, and affirmed as to the item of $2.425 embraced in the *fifth* cause of action, the justice of the case requires that Clark should not recover any costs other than those incurred in the prosecution of the claim embraced within the *fifth* cause of action; that he should not be allowed to recover the costs incident to the reference, including the fees of the referee, stenographer, etc.; as no part of such costs were necessarily incurred in the prosecution of the claim asserted in the fifth cause of action. Substantially all the costs of this action were incurred because

of the reference, which was made necessary by the claims that were asserted under the contract for the construction of the road, for extra work, etc., and on which Clark failed. He ought not therefore to have or recover such costs. In remanding this cause to the Circuit Court, it is submitted that this court has the power, and should give directions as to what costs either party is entitled to recover as against the other.

Respectfully submitted.

BURTON HANSON,
Attorney for the Petitioner, Chicago, Milwaukee & St. Paul Railway Company.

GEORGE R. PECK,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 256.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Petitioner,

vs.

HEMAN CLARK,
Respondent.

Reply to Brief of Respondent.

Believing that this court would in this case review only the questions considered and passed upon by the court below, we did not deem it necessary to discuss or consider in our principal brief any other questions than were decided by that court. Counsel for respondent have in their brief, raised other questions, and while we insist that this court, as this case now comes before it, cannot properly consider, and will not consider any other questions than those passed upon by the court below, we have thought it proper to file this brief in reply.

FIRST.

This court has power to review and revise the rulings and decisions of the referee, in matters of law, as embodied in and made the findings, rulings and decisions of the Circuit Court, and the judgment entered thereon by the court upon the hearing before it, upon the report of the referee and the exceptions thereto, and the case and bill of exceptions, and the assignments of error, at least so far as to determine whether the finding of fact made by the referee and adopted by the court, support the conclusions of law, or authorized the judgment entered against the Railway Company.

The doubt expressed by this court in *Boogher vs. Life Ins. Co.*, 103 U. S. (13 Otto.), 90, as to "whether cases tried in the Circuit Courts by a referee, in States where such a practice exists," could be reviewed by this court, notwithstanding the Act of June 1, 1872 (17 *Stat.* 196, *ch.* 255; *Sec.* 914, *U. S. R. S.*), which provided for conforming the practice, pleadings, forms and modes of proceedings in civil cases, other than equity and admiralty causes, in the Circuit and District Courts, as near as may be to the practice pleadings, forms and modes of proceeding existing in like causes in courts of record of the State, has been removed by a number of subsequent decisions, allowing writs of error in such cases, and entertaining and reviewing questions of law arising therein, upon reports and findings of a referee, in cases referred, pursuant to State practice, and the rules of the Circuit Courts, and revising the action of the Circuit Court upon such reports of a referee, by

either reversing or modifying the judgements entered thereon.

Paine vs. Central R. R. Co., 118 *U. S.*, 152.
Roberts vs. Benjamin 124 *U. S.*, 64.
Shipman vs. Mining Co., 158 *U. S.* 356.

In the *Boogher* case, page 97, this court said that if the facts found by the referee were confirmed by the court upon a hearing upon the referee's report, and exceptions to it, they might be treated as the findings of the court; and, in such case, they could be considered and made the foundation of review of the questions of law raised on them in the record, upon exceptions to the overruling of objections to the referee's report.

In the case at bar the findings and conclusions of the referee were made the findings and conclusions of the Circuit Court. (Rec., p. 224.)

Section 700, U. S. R. S. (*Act.* 1865, *ch.* 86 *Sec.* 4), provides for a review, on writ of error, by this court of cases where an issue of fact in a civil cause has been tried by the court without a jury, of the rulings of the court in the progress of the trial, upon a bill of exceptions; and when the finding is special, for extending the review to the determination of the sufficiency of the facts found to support the judgment, "whenever the parties, or their "attorneys of record, file with the clerk a stipulation in "writing waiving a jury."

This court in the *Boogher* case further held that "*the "consent to a reference necessarily implied a waiver of a jury.*" Such consent by the attorneys of record of the parties in this case was in writing, filed with the clerk (*Record, pp.* 46-48, *fols.* 137-143), and the judgment, or order for judgment, entered upon the hearing, upon the

referee's report, by the Circuit Court, without a jury, recited that "*a trial by jury having been expressly waived by "the written consent of the parties duly filed with the clerk "of the court.*" (*Record, p.* 221, *fol.* 662.)

In *Heckers vs. Fowler* (2 *Wall.*, 123), it was said that where, in a case tried before a referee, upon consent of the parties, and order or rule of the court, his report has been made and *accepted*, it will be the proper foundation for a judgment. "Judgment, however (the court said), cannot, "in general, be entered in conformity to the report or "award, *until it is accepted or confirmed by the court.*" "*Such a report of referees is in many respects a substitute "for the verdict of a jury. Where there is no agreement to "that effect, no judgment can be entered on such a report "until the same has been accepted.*"

The conclusion of the court was that the equity of the statute allowing a bill of exceptions in courts of common law embraces all such judgments *or opinions of the court*, arising in the course of a cause as are the subjects of revision by an appellate tribunal, and *which do not otherwise appear on the record;* and that a bill of exceptions would lie, upon writ of error, to exceptions to the ruling of the court overruling objections to a referee's report and rendering judgment thereon in accordance therewith.

Allusion is made to the fact that appellate courts in other jurisdictions are accustomed to revise such judgments and opinions, and the court said: "Upon principle we can see "no objection to the introduction of the same practice in "the courts of the United States, under the limitations," that the Supreme Court cannot determine in cases at common law the weight or effect of evidence, nor decide mixed questions of law or fact. Whenever a report of referee is presented and before it is accepted, the party against whom

it is made may object to its acceptance; and, if required, reduce his objections to writing and file them in the case. "Hearing is then had, and after the hearing the court may "accept or reject the report; or the report may, for "good cause shown, be recommitted" (2 *Wallace* 131), as was done in this case.

In *Paine vs. Central Vermont R. R. Co.* (118 U. S. 152–158, May, 1886,—some time after the case of *Boogher vs. Ins. Co.* (103 U. S., 90), it was held by this court that in an action in the Circuit Court submitted by stipulation of the parties, in accordance with the practice prevailing in the State where the court is held, to the decision of the judge, "*as a referee*," it would, upon a writ of error, consider the question, *whether there was any error of law in the judgment rendered by the court, upon the facts found by the referee.*

This would clearly warrant the examination and determination of the questions presented in this case by the exceptions filed to the decision and judgment of the court in several forms, and the assignments of error, that judgment in favor of the plaintiff below was not warranted, as matter of law, upon the facts found by the referee; but that the defendant rather was entitled to judgment in its favor upon the facts so found.

Record, pp. 222, 223, fols. 666, 667; p. 224, fols. 671, 672; p. 228, fol. 682; p. 479, fols. 1435, 1436–1440, etc.

This Court, in *Paine vs. Central Vt. R. R. Co.*, fully reviewed and passed upon the questions of law presented by the findings of the Judge "*as referee;*" and in *Roberts vs. Benjamin*, 124 *U. S.* 64 (1888), the judgment entered upon "or pursuant to the report of the referee" appointed "to determine the issues" before whom the case was tried, was reviewed by this court, as to questions of law, arising upon

the facts found by the referee; *and as to whether the facts found warranted the judgment.*

And again in *Shipman vs. Mining Co.*, 158 *U. S.*, 356, as late as May, 1895, this court reviewed the decision of the Circuit Court upon the report and findings of a referee, to whom the case had been referred by consent, in open court, *and reversed the judgment* entered upon the report of the referee. The court held *that where the findings of the referee had been ordered to stand as the findings of the court*, as was done in the case at bar, it would consider whether the facts found by the referee sustained the judgment.

A similar practice has long prevailed in the Circuit Courts of the United States.

In *Sicard vs. Buffalo, N. Y. & P. Ry. Co.*, 16 *Blatch*, 525 (*U. S. Circt. Ct., Northn. Dist. N. Y., Jan., 1879*, BLATCHFORD, J.), upon a writ of error to the *District* Court, where the judgment of that court was based on the report of a referee, it was held, that the findings of fact made by the referee were conclusive in the Circuit Court, but that his conclusions of law could be questioned so far as they are challenged by exceptions filed in the District Court.

> It appeared that after the cause was at issue it was referred, by consent of counsel for both parties in open court, *to a referee, to hear, try and determine the same*, the order of reference providing that, on filing the report of the referee, judgment might be entered thereon, on application to the court at any time. The referee reported in favor of the plaintiff. The defendant filed exceptions to the findings and decisions of the referee. *The report and exceptions were brought before the court, and it made an order overruling the exceptions and confirming the report*, and ordering that judgment be entered for the plaintiff in accordance with the report.

> The Court said: "The only question on the record is, whether the report of the referee ought to be sustained, as against the exceptions filed. The findings of fact made by the referee are conclusive. Only his conclusions of law can be questioned, and that only so far as they are challenged by the exceptions filed in the court below. (*p.* 526.)

The court thereupon stated in detail what the findings of the referee as to the facts were (pp. 526-7-8); and what were his conclusions of law and decision, and the exceptions thereto; and reviewed the decision fully. (*pp.* 529-31.)

And in *Tyler vs. Angevine*, 15 *Blatch.*, 536 (*Same Circuit, Feby.*, 1879. BLATCHFORD, J.), substantially the same thing was held: That the conclusions of law and decisions upon findings of facts by a referee could be reviewed on writ of error.

It was a suit at law and it was referred to a referee, "to hear, try and determine the issues" therein. The court said (p. 543): "*The referee, as to the finding of facts, stood in the place of a jury.*"

The case was reviewed at great length, as to the law and decision of the referee upon his findings of fact, as well as to questions of evidence. (*pp.* 537, 545, 549.)

In *Town of Lyons vs. Lyons Nat. Bank*, 8 *F. R.*, 369, (*Circuit Court, N. D. N. Y., May*, 1881, BLATCHFORD, C. J.): the attorneys for the respective parties to a suit at law, brought in the *District Court* of the U. S., by a written stipulation waived a jury trial, and agreed that the court should hear the action "without a jury." The action was tried, a written decision was filed, finding certain facts and

certain conclusions of law thereon, and a judgment entered. The cause was afterwards taken to the Circuit Court on writ of error, and, although the Court held that the rulings or findings of fact, and the conclusions of law connected therewith were not open to revision, as facts so found were found in a way unknown to the common law, nor yet provided by statute, "inasmuch as there is no statutory provision in respect to *District Courts* for the waiver of a trial by jury," while there was such a provision in respect to *Circuit Courts* in Section 649, U. S. R. S.; the court, however, said:

> "*The above views do not interfere with the right to have a trial by a referee in a suit at law, by consent, in the District Court, or with the power of the Circuit Court, on a writ of error, to revise the proceedings on the trial before the referee on proper papers.* This was done by this court (U. S. Circuit) in *Sicard vs. Buffalo, etc., Ry. Co., 15 Blatchfd.*, 525, and in *Tyler vs. Angevine, Id.*, 536."
>
> "*This practice is founded on the view held by the Supreme Court, that the referring of actions under a rule of court, by consent of parties, was well known at common law, and as well established and as fully warranted by law as actual trial by jury.*"

Quoting

Alexandria Canal Co. vs. Swan, 5 How., 89.

York, etc., R. R. Co., vs. Meyers, 18 How., 246.

Heckers vs. Fowler, 2 Wall., 123.

See also

Robinson vs. Life Ins. Co., 16 Blatchfd., 194, 201.

In *Dexter vs. Sayward*, 66 *F. R.*, 265-268 (*U. S. Circuit Court, Washington, 1894*), the case came up for hearing in the Circuit Court, on exceptions to the report of a referee, to whom the case had been referred to hear and

determine the issues; and the court re-examined the findings of the referee, both as to the facts and the law, and the exceptions were overruled before judgment was directed to be entered.

This same case came up in the Circuit Court of Appeals (9th Circt., February, 1896), 72 *F. R.*, 758-762, under title of *Sayward vs. Dexter*. No question was raised as to the correctness of the practice below in the trial of the case before the referee, or as to the bringing up of the decision of the court upon the referee's report, by writ of error; and the court reviewed the questions raised upon the writ of error and the judgment. The court said, "The "cause was, on the written stipulation of the parties, sent to "a referee, who reported findings of fact and conclusions of "law," and that defendant was indebted to plaintiff as upon an account stated in the sum of $130,308, with interest. Both parties filed exceptions to the report, *which were heard by the court*. The findings of fact by the referee were adopted by the Circuit Court, *but his conclusions of law were modified*, the court holding that the plaintiff was entitled to recover $153,128 with interest, making $192,-627, instead of $130,308, for which judgment was entered; thus increasing the amount of the recovery directed by the referee; and this was affirmed by the Appellate Court.

See also *Shipman vs. Coal Exchange*, 70 *F. R.*, 652 (Circuit Court of Appeals, 6th Circt., 1895).

In *North American Loan & Trust Company vs. C. & U. S. Mortgage Co.*, 76 *F. R.*, 623 (U. S. Circt. Ct. Dist., South Dakota, October, 1896), RINER, D. J., said:

> "This case is before the court upon the motion of plaintiff to confirm the report of the referee, and to enter judgment thereon, and upon exceptions filed by the defendant to the findings of fact and conclusions

of law made by the referee. *A trial before a referee is conducted in the same manner as a trial before the court.* To obtain a review of the evidence and proceedings, exceptions taken to any order or ruling made by the referee should be embodied in a bill of exceptions, *signed by him. He is the proper party to sign a bill of exceptions, and not the judge making the order of reference.*"

"It is well settled that an objection or exception based upon the contention that the findings are against the weight of evidence cannot be considered by the court, *unless the entire evidence is preserved by a bill of exceptions taken before the referee.*

"No bill of exceptions having been taken before the referee, the only question which can be considered by the court is what judgment should be rendered upon the findings of fact made by the referee."

The court thereupon reviewed the findings of the referee, and said: "Being unable to concur with the referee "in the conclusions of law made by him, I am constrained "to sustain the exceptions taken thereto, and to enter "judgment upon the facts found by him in favor of the de-"fendant;" thus reversing the decision of the referee.

This decision was reviewed by the U. S. Circuit Court of Appeals in the Eighth Circuit(*Dec.. 1897*) upon a writ of error from the judgment entered in the Circuit Court upon it.

N. A. L. & T. Co. vs. C. & U. S. Mfg. Co., 83 *F. & R.*, 796-803.

The court reviewed all the findings of the referee as to the facts, so far as they affected his conclusions of law, and the decison of the Circuit Court thereon; and modified the judgment, and as modified, affirmed it.

The court further held, as did the Circuit Court, that two findings made by the referee, designated as findings of

fact, were "essentially conclusions of law, and in no sense findings of fact"—"merely conclusions drawn by the referee" from the facts detailed, and that the conclusions thus drawn were erroneous.

In *Insurance Co. vs. Boon*, 95 *U. S.* (5 *Otto*) 117, it was held that a judgment entered upon special findings of fact, which belonged to the record as fully as does the verdict of a jury, were subject to review without a bill of exceptions

SECOND.

The suggestion that this action was tried before the referee as a common-law arbitrator, is without foundation.

Neither party for a moment supposed during the trial of the action the referee was acting as a common-law arbitrator; nor did the referee himself have any such idea. Neither party would have proceded with the reference if they had so understood.

Both parties believed that they were conducting a trial before the referee in accordance with the practice in the State courts; and that such trials were authorized in the United States Circuit Court by virtue of the provisions of the Act of June 1, 1872 (*See* 914 *U. S. R. S.*), which enacts that the practice, pleadings, forms *and modes of proceeding* in civil cases, other than equity and admirality causes, in the Circuit and District Court shall conform, as near as may be, to the practice, pleadings, forms and modes of proceeding existing in like causes in the courts of record of the States where such Circuit and District Courts are held. (17 *Stat.* 196, *Ch.* 255.)

This is apparent, from the statement of the referee in his first report (*Record, p.* 50, *fol.* 148), that the requests to find submitted by each of the parties at the close of the trial before him, were "unnecessary under the present practice;" and, also, by his statement of his "conclusions of fact and law" together, in accordance with the provisions of Section 1022 of the N. Y. Code of Civil Procedure, as amended in 1895, (to which he undoubtedly alluded as the "present practice"): which authorized the court or referee, before whom a case is tried without a jury, to "file a decision stating concisely the grounds upon which the issues have been decided, and direct the judgment to be entered thereon," instead of stating separately the facts found and his conclusions of law; thereupon the Appellate Court shall, upon exceptions filed to the decision and upon appeal from the judgment, review all questions of fact and law, and may reverse or modify the judgment, &c.

Such references are also directly sanctioned by the rule of the United States Circuit Court for the Southern District of New York of February 5, 1877, in pursuance of which consent to the reference in this case was made by both parties, and in accordance with its terms.

This was not a common-law reference at all, but a refference under the statutes of the United States which adopted and authorized the "*modes of proceeding*" existing in like causes in courts of record of the State, and pursuant to a rule of the court.

THIRD.

The written consent to the reference or to the trial before the referee was a sufficient "stipulation in writing waiving a jury trial," within Section 649 U.S. Revised Statutes.

This was distinctly and directly decided by this court in *Boogher vs. Ins. Co.* (103 *U. S.* 90), where the court held that "*the consent to a reference necessarily implied a waiver of a jury;*" and, as the consent to the reference in this case was in writing, filed with the clerk, the stipulation waiving a jury trial was in writing.

References under the N. Y. Code of Civil procedure can only be made in the State courts, "upon the consent of the parties manifested by a written stipulation signed by their attorneys and filed with the clerk," except in special cases. (*Code C. P. Secs.* 1011, 1012 *and* 1013).

The question in *Kearney vs. Case*, (12 Wall.; 97 U. S., 275) was whether there was any consent in writing at all in that case, filed as required, waiving a jury trial. The court held that it did not appear by the record there, that there had been such a written consent; but that it appeared affirmatively to the contrary.

While the court held that there could be no review of the rulings of the court, unless the record showed that such a consent was signed and filed, it also held that the existence of such a writing may be shown either by a copy of the agreement or by a statement to that effect in the record entry of the judgment. The court said: "If, for in-"stance, it is stated in the findings of fact by the court, or

in the bill of exceptions, *or in the record of the judgment entry*, that such a stipulation was made in writing, *the record would show that the condition in which a review is allowed existed*, and we would not feel at liberty to contradict the record in this respect."

The court's discussion of the effect of the trial in that case, referred to in brief of respondent's counsel, was based upon the conclusion that there was no consent in writing waiving a jury in that case.

In the present case, not only was the consent to the reference in writing duly filed, which, as this court held in *Boogher vs. Ins. Co.* (103 U. S., 97), "*necessarily implied a "waiver of a jury*," but the judgment itself distinctly recited that "*a trial by jury having been expressly waived by the "written consent of the parties, duly filed with the clerk of the "court.*" (Record, p. 221, fol. 662).

This recital and entry were expressly approved and consented to by the plaintiff below, or his attorneys, in their approval of and consent to the judgment (p. 226; fol. 677); **and amounted to a consent waiving a jury, or to an admission that the consent to the reference contained a stipulation in writing that a trial by a jury had been expressly waived.** He ought not to be now permitted to contradict it.

The decision in the case of *Campbell vs. Boyreau* (21 *Howard*, 223) (December, 1858), so often referred to and so much commented on, was prior to the act of March 3, 1865 (*Chap.* 86, *Stats*, *Vol.* 13, *p.* 501, *Secs.* 649 *and* 700, *U. S. R. S.*), authorizing trials by the court without a jury, where the written stipulation waiving a jury is filed, and empowering the Supreme Court upon a writ of error to ex-

tend the review "*to the determination of the sufficiency of the facts found to support the judgment.*"

In *Fleitas vs. Cockrem*, 101 *U. S.* (11 *Otto*), 301, it was held that a "statement in the record that an issue was "called for trial by the court, the jury having been waived "in writing, is, in the absence of anything to the contrary, "conclusive that the requisite agreement for such trial was "made."

In the *Boogher* case (103 *U. S.*, 97) the court said: "It "nowhere expressly appears in this case that a stipulation "was filed, but inasmuch as an action of this kind could "not, under the practice act of Missouri, be referred with- "out the written consent of the parties, and this was re- "ferred by consent, we think we must assume that a con- "sent was given in such form as to authorize what was "done under it. The withdrawal of a juror after the trial "was begun and the consent to a reference *necessarily im- "plied a waiver of a jury*, and as this consent to be avail- "able must have been in writing, it follows that the waiver "which flowed from the consent was also in writing. We "think, therefore, that it sufficiently appears that the stipu- "lation which the Act of Congress requires was entered "into." And under the state practice in New York the consent to the reference was required to be in writing, as before stated. (*Code, Sec.* 1011.)

In *Supervisors vs. Kennicott* (103 U. S., 554-556) it was held that a stipulation signed by the parties or their attorneys, and filed with a clerk of the Circuit Court, submitting a civil cause for trial on an agreed statement of facts, is "a stipulation in writing waiving a jury" within the meaning of Section 649 of the Revised Statutes; and also that the court has authority, under Section 700 of the Re-

vised Statutes, to determine, as in case of a special verdict, "*whether the facts set forth in such statement are sufficient in* "*law to support the judgment, although the finding of the* '*Circuit Court on them in form be general.*"

The court, per Mr. Chief Justice WAITE, said:

"As the case could not be submitted to the court for 'trial without waiving a jury, a stipulation to submit, "especially if it be on agreed facts, is in itself a sufficient "waiver to meet the requirements of Section 649."

In *Bond vs. Dustin* (112 *U. S.*, 604), while it was held that in actions referred by rule of court *to an arbitrator*, only rulings and decisions in matters of law, after the return of the award, are reviewable, it is also held that the existence of the condition upon which a review is allowed is sufficiently shown by a statement in the finding of facts by the court, or in the record of the judgment entered, that such a stipulation was made in writing; as was held in *Kearney vs. Case* (12 *Wall.*, 283, 284) and *Dickinson vs. Planters' Bank* (16 *Wall.*, 250); and the decision in *Boogher vs. Insurance Co.* (103 *U. S.* 90), holds that an order of reference expressed to be made by consent of parties necessarily implies that such consent was in writing, and that such consent was a sufficient stipulation in writing, waiving a jury.

Besides, the questions sought to be reviewed in this case do relate to rulings and decisions in matters of law *after the return of the award*, which are reviewable anyhow.

In *Shipman vs. Mining Co.* (158 *U. S.*, 356-359), there was not even a written consent to the reference or waiving a jury; yet the court held that the question was before the

court whether the facts found by the referee sustained the judgment.

In *Board of Commissioners vs. Sherwood*, 64 *F. R.*, 103 *and* 105, (Circuit Court of Appeals, 8th Circt.. Oct., 1894), where a jury was waived by stipulation, and the case referred to a referee for trial, he filed a report containing his findings of fact and conclusions of law; and the court "adopted each finding of facts made by the referee as findings of fact made by the court." The Appellate Court treated the case precisely as if it came up on a special finding of facts made by the trial court, and held that the questions open for review were those which might have been reviewed if the trial had actually taken place before the court under a written stipulation waiving a jury, and the court had made a special finding of the facts.

In *Shipman vs. Coal Exchange*, 70 *F. R.*, 652 (Circuit Court of Appeals, 6th Circuit, Nov., 1895), it was held that upon the review and confirmation of a Master's report, to whom the case was referred, the question open was whether there was any error of law in the judgment so entered, upon the facts found by the court, although there was no stipulation in writing waiving a jury trial.

In *Wesson vs. Saline County* 73 *F. R.* 917 (Circuit Court of Appeals, 7th Circuit, 1896), the court held that the question for review upon a special verdict or finding, is whether the facts found are sufficient to support the judgment. It also held that a special finding, like a general finding or verdict, is in itself a part of the record, without being embodied in a bill of exceptions.

In the case of *Paine vs. Central Vermont R. R. Co.*, 118 *U. S.*, 152, there was no written stipulation waiving a jury, in terms; but it appeared that the counsel of the parties signed and filed an agreement in writing by which it was "stipulated and agreed to refer this case to Hon. Hoyt H. Wheeler *to try and decide this case as referee*," as the record states (118 *U. S.* 153). This was pursuant to the laws and practice in the State of Vermont where the cause was pending in the U. S. Circuit Court. The referee filed his report, which was more in the nature of a general statement than of formal finding of fact, signed "Hoyt H. Wheeler, Referee" (pp. 153-156). The record then stated, that afterwards "said cause came on for trial upon the report of the referee before Hon. HOYT H. WHEELER, District Judge, &c., and after hearing the arguments of counsel for the plaintiff and defendant the court filed its decision in said cause, rendering judgment for the defendant" being the opinion reported in 14 Fed. Rep., 269. There was apparently no making the findings of the referee to be the findings of the court.

This court, by Mr. Justice GRAY, said: "This case was not submitted to the decision of the court without a jury, pursuant to the Revised Statutes of the United States, Sections 649, 670, but to the decision of the judge *as referee*, in accordance with the statutes and practice of Vermont. The only question presented by the writ of error, therefore, is *whether there is any error of law in the judgment rendered by the court upon the facts found by the referee.*" (118 *U. S.*, 158).

See also *Ryan vs. Carter*, 93 *U. S.*, 81.

It was thus held that whether there is any error of law in the judgment rendered by the court, upon the facts found by the referee, might be enquired into and reviewed by the

Appellate Court, even where there are no special findings of fact by the court, and where there was no written waiver of a jury filed except as contained in an agreement to refer to a referee to try and decide, or determine.

FOURTH.

The suggestion that the judgment entered below, upon the direction of Judge Brown, was entered or directed by consent of the parties, is a perversion of the facts and the record.

The fact that *the form* of the judgment was approved by the defendant's attorneys, does not show that it was entered by consent. The judgment itself shows that it was opposed (*Record, p.* 224, *fol.* 671).

Whether Judge Brown heard the parties formally or informally, is immaterial.

The very object of the parties in putting the judgment in the form in which it is, was, as avowed at the time, to so make it and shape it that it would be subject to review, by making the rulings and decision of the referee the rulings and decision of the court.

Upon the judgment or order for judgment, signed by Judge Brown and the judgment entered in pursuance thereof, the point clearly arises, whether it was not a question or error of law, arising after the filing of the referee's report, for the court to overrule the defendant's exceptions to the referee's report, to confirm the report of the referee, and make it the judgment of the

court; and to enter the judgment thereon which was entered in favor of the plaintiff below against the defendant for $88,084.86.

FIFTH.

The intimation that the hearing or proceeding before Judge Brown, which resulted in the entry of the judgment of April 6, 1898, was simply a motion for a new trial under the rule of the court, is equally without foundation.

Nowhere in the record of the decision, or order or judgment of Judge BROWN, is there a statement or suggestion that the defendant below made any motion for a new trial.

What the record does show, is, that upon the report of the referee and the exceptions filed thereto by the defendant below, and upon the case and bill of exceptions allowed by the referee, the plaintiff moved and applied for judgment upon and in accordance with the reports of the referee, notwithstanding the several exceptions filed by the defendant, and the case and bill of exceptions; and at the same time the defendant moved to set aside each of the reports of the referee, and for judgment thereon for the defendant, on the several grounds (1) *that the findings of fact made by the referee, as contained in his report filed on the 18th of February, 1898, did not authorize said judgment for the plaintiff;* (2) *that the referee's conclusions of law, as set forth in his report, were not sustained by any finding of fact therein set forth;* (3) that the referee's

conclusions of law were erroneous; (4) that the referee's findings of fact as to the first cause of action entitled the defendant to judgment dismissing the complaint as to that cause of action; and (5th) that the referee's findings of fact as to the cause of action for lumber alleged to have been used by the defendant were not sustained by the evidence, and that there was no evidence to support said findings of fact. (*Record, pp.* 222-3, *fols.* 666-7.)

There is no suggestion of a motion for a new trial there; but a motion by the plaintiff for judgment in accordance with the report of the referee; and a motion by the defendant for judgment thereon for the defendant on the several grounds stated.

It also appears by the judgment, or order for judgment, that the counsel for the defendant requested the court to find as matters of fact, and to decide as conclusions of law, each and every of the several statements of fact and the several propositions of law stated in the several requests to find and decide, submitted by the defendant to the referee, and annexed to and made a part of his report; and that the court refused to make or give any or either of the said findings of fact, or any or either of the several conclusions of law, which, as stated in the referee's report, were refused by the referee; and adopted, allowed and gave or made each and every such finding of fact and conclusion of law as had been made and allowed or given by the referee. (*Record, p.* 223, *fols.* 568-9.)

The court below, therefore, by this proceeding, made each of the findings of fact and conclusions of law of the referee the findings of fact and conclusions of law of the court; and refused each and every of the requests to find and decide as conclusions of law, which were made and

requested by the defendant of the referee; so that the findings of fact and conclusions of law of the referee were made and became the findings of fact and conclusions of law of the court, as if the case had been tried by the court before a judge without a jury, a trial by jury having been expressly waived by a written consent of the parties, duly filed with the clerk.

Thereupon, as the judgment shows, the court, "*having heard counsel for the respective parties, and due deliberation having been had thereon,*" it was ordered and determined that each and every of the several exceptions taken and filed by the defendant to the reports of the referee, *and to each of them*, and to each and every of the several findings of fact and conclusions of law made by the referee, as contained in his said report or reports, and each and every of the several exceptions taken and filed by the defendant to the several refusals of the referee to find and decide, as severally requested by the defendant, as to which findings, conclusions and refusals the defendant had made and filed exceptions, were overruled; and each and every of the rulings and decisions of the referee in and upon the trial of the action, *as contained and appearing in the case and bill of exceptions*, and the decisions, findings of fact and conclusions of law of the referee as stated and contained in his reports, were made the ruling decision, findings of fact and conclusions of law of the court in action. (*Rec., pp.* 223-224, *fols.* 669-70.)

The whole record of the proceedings before the referee, including the statement of the proceedings contained in the case and bill of exceptions, was thus made the record of the proceedings, rulings and decisions of the court as upon a trial by it; and the court thereby adopted the case and bill of

exceptions made and settled by the referee, as a record of the proceedings in the action had before it, and adopted the rulings therein contained as the rulings and decisions made by the court.

The decision or judgment signed by Judge BROWN further shows that the defendant's motion for judgment in favor of the defendant upon the report of the referee, and to set aside the report of the referee, and for judgment dismissing the complaint in the action, which, as appears in the previous part of the record, had been made by the defendant upon the grounds before stated (*fols.* 666-67), was denied; to which denial the defendant duly excepted (*fol.* 671.)

Thereupon it appears that upon motion of the attorneys for the plaintiff, *the defendant opposing*, it was ordered that the plaintiff recover of the defendant the sum of $80,479.35 with interest, together with the costs, etc., of the action. (*Rec., p.* 224, *fol.* 672.)

The decision and judgment also show that thereupon the defendant moved for an arrest of judgment in the action on the grounds stated, namely (1), that the plaintiff was not entitled to judgment upon the complaint therein, as to the first cause of action, upon the facts found, or the findings of fact made by the referee and by the court, as stated in the report of the referee, which was made the findings and decision of the court; (2) that as to the first cause of action, the right of the plaintiff to recover the two sums of $9,558.63 and $40,000, mentioned in the referee's report, was barred by the receipt or acknowledgment of March 9, 1888; (3) that the plaintiff was not entitled to judgment upon the complaint as to the first cause of action, inasmuch

as the award of said judgment to the plaintiff constituted a judgment of recovery for equitable relief in an action at law; and (4) that the plaintiff was not entitled to judgment upon the complaint as to the cause of action for the recovery of the value of certain lumber alleged to have been taken by the defendant railway company, for the reason that the cause of action therefor is one which could not be united with the other causes of action stated in the original complaint; which motion, or motions, and each part of them, were denied; to which denial the defendant excepted. (*Rec., pp.* 224-6, *fols.* 672-6.)

There was not anywhere a suggestion of a motion for a new trial, but rather of a motion or motions for judgment for the defendant upon the referee's report upon the grounds stated, which were principally that the findings of fact made by the referee and adopted by the court did not authorize the judgment which was awarded to the plaintiff; but did warrant a judgment for the defendant; and to all the decisions of the court the defendant duly excepted. (Rec., pp. 226-28, fols. 678-83.)

The judgment or *postea* signed by the clerk does not anywhere recite or state that any motion for a new trial was made, but it does state that the defendant had filed exceptions to the report of the referee and that such exceptions had been overruled and "*the judgment of the said referee confirmed and made the judgment of this court.*" (Rec., p. 229, fol. 686.)

SIXTH.

The Assignments of Error are sufficient to raise the questions discussed in our principal brief and passed upon by the court below.

The Circuit Court of Appeals in disposing of the case held the assignments of error to be sufficient to raise the questions which we have discussed in our principal brief; and this court having ordered this case here to review the questions passed upon by the court below, the sufficiency of the assignments of error in that court will not be reviewed or considered here. But the assignments of error are sufficient to raise the questions which were presented to the court below and decided, and which are presented here.

1. The first question: *Do the findings of fact support the judgment as to the items of $9,558.63 for nut-locks, and $40,000 for overtime penalty?* is raised by the findings themselves, the exception to the ruling of the court in refusing to order judgment for the defendant, and in ordering judgment for the plaintiff. (*Rec. pp.* 220, 223, 224, 226-9), and by the several assignments of error, particularly the *sixth*, *seventh*, *eighth*, *ninth* and *eleventh* assignments of error (*Rec. p.* 479), and the *thirty-sixth* and *thirty-seventh* assignments of error (*Rec. p.* 488).

2. The second question: *Is there any legal evidence to support the findings and the judgment entered thereon as to the item of $2,425 for bridge timber alleged to have been wrongfully converted by the Company in June, 1888?* is raised by the refusal to find, as requested, that the defendant did not ,in the month of June, 1888, or at any other

time, wrongfully or otherwise take possession of any timber belonging to the plaintiff, or convert the same to its use for the purposes of repairing a washout or otherwise (*Request No. 37, Rec. p.* 211), the exception thereto (*Exception No. 27, Rec. p.* 263, *also Exception No.* 17, *Rec. p.* 456), and the several assignments of error, particularly the *seventy-fourth* assignment of error (*Rec. p.* 501).

These exceptions and assignment of error were based expressly upon the ground that there was no proof in the case to sustain the findings that the defendant wrongfully or otherwise took or appropriated the timber in question. Manifestly, they present questions of law.

3. The third question: *Whether in an action on contract the complaint may be amended on the trial against the objection of the defendant by adding thereto a cause of action in tort, and a recovery allowed on such additional count?* is raised by the motion made at the close of plaintiff's case to amend his complaint. (*Rec. p.* 280), the objection thereto *Rec., p.* 282), the overruling thereof (*Rec. p.* 284, the exception thereto *Rec. p* 285), the motion in arrest of judgment, the denial thereof, and the exception thereto. (*Rec. pp.* 225-226), and by the *sixteenth*, *seventeenth* and *eighteenth* assignments of error. (*Rec. pp.* 481-482.)

It should be born in mind that this cause came on for trial and was heard at a regular term of the Circuit Court of the United States for the Southern District of New York, before Brown, District Judge, without a jury, (*a trial by jury having been expressly waived by the written consent of the parties filed with the clerk of the court*); that upon such trial each and every of the several rulings and decisions of the referee as contained and appearing in the case and bill of exceptions, and the decisions, findings, and con-

clusions of law of the referee were made the ruling, decision, finding of fact and conclusions of law of the court (*Rec. pp.* 221–225). This being the state of the record, the rulings, decisions, findings of fact and conclusions of law so made by the Circuit Court are reviewable here.

Revised Statutes of the United States, Sections 649 and 700;

Paine v. *Railroad Company*, 118 U. S., 152–158.

Shipman v. *Mining Company*, 158 U. S., 356.

Roberts v. *Benjamin*, 124 U. S., 64.

Board of Comrs. v. *Sherwood*, 64 Fed Rep., 103–105.

SEVENTH.

The dispute between Clark and the Company over the nut locks and overtime penalty, which existed prior and up to the time of the settlement, having been in good faith, and such a dispute as might legitimately and fairly have been brought by either party into court, had no settlement been made, it is wholly immaterial to the consideration of this case that ten years subsequent to the settlement the court, after a protracted and closely contested litigation, has found the fact and the law, over which such dispute was raged, in favor of Clark.

As Thompson, J., remarked in *Union Bank of Georgetown* v. *Geary*, 5 Peters, 99, 114:

> "And to permit a subsequent judicial decision on this point in their favor, as having a retrospective effect, so as to annul a settlement or agreement made by them under a different state of things, would be sanctioning a most mischievous principle."

Lord Hardwicke, in *Stapleton* v. *Stapleton*, 1 Atkyns, p. 12, following a previous decision of Lord Macclesfield, said:

> "An agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreements of the parties, for the right must always be on the one side or the other, and, therefore, the compromise of a doubtful right is a sufficient consideration of an agreement."

And in Chitty on Contracts, 11 Edition (note) 1, p. 46, it is said:

> "The real consideration which each party receives under the compromise, being not the sacrifice of the right, but the settlement of the dispute, and the abandonment of the claim, it is no objection to the validity of the transaction that the right was really in one of the parties only, *and that the other had no right whatever.*"

And Justice Miller, in U. S. *v.* Child, 12 Wall. 245, said:

> "It is of no avail to urge that the Court of Claims has found that the whole claim was just and ought to be paid. After the compromise that question was no longer open to inquiry. It is the very essence of such adjustments of disputed rights that the contest shall be closed."

And LaCombe, J., in his opinion (Rec. 525), says:

> "Of course, it makes no difference that eventually it turns out that some supposed legal defence of the debtor is held to be insufficient; if he is in a position to litigate in good faith and with *some* color of right,

> and gives up his right to throw the claim into court, he gives a valuable consideration for any settlement, and no claim to which such a defence may be interposed can be fairly called a liquidated claim, even to the extent to which the debtor may have theretofore expressed his willingness to pay. '*If it appears that the claim furnished opportunity for controversy, although a favorable result could not have been safely predicted * * * sufficiency of consideration woula be established.*' "

Applying the rule here announced, the settlement between Clark and the Company is supported by a sufficient consideration; for it is found as a fact that the claims for nut locks and overtime forfeiture were in dispute between them at and prior to the time of the settlement. It likewise appears that these claims were asserted in good faith by the Company, and if they had not been allowed by Clark it could have litigated them "*in good faith and with some color of right.*" They were, as stated by LaCombe, J. (Rec. 517), "*legitimate matters of dispute, and unless settled by agreement of the parties might fairly be brought by either party into court.*"

These items of the account being in dispute, and disputed in good faith, the balance due on the account between Clark and the Company was necessarily in dispute. This dispute the parties adjusted between themselves, Clark conceding the facts to be as the Company claimed them, and neither fraud nor duress nor mistake having intervened, it is wholly immaterial that the court has found at the end of long and expensive litigation the facts in favor of Clark. By the settlement Clark conceded the facts to be as claimed by the Company, and therefore allowed the claims in full,

for the *facts* upon which the claims were based, and not the *amount* of the claims were in dispute.

To apply the rule announced by Mr. Justice Miller in U. S. *v.* Child & Co., *supra*, to this case:

> "In this view of the case, it is of no value to urge that the court has found the facts in favor of Clark, and that he ought not to have allowed the claims. After the compromise that question was no longer open to inquiry. It is of the very essence of such adjustments of disputed rights that this contest shall be closed."

BURTON HANSON,
Attorney for Petitioner,
Chicago, Milwaukee & St. Paul
Railway Company.

GEO. R. PECK,
Of Counsel.

Supreme Court of the United States

No. 678, October Term, 1899.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,

Petitioner,

against

HERMAN CLARK,

Respondent.

Brief for Respondent in Opposition to Application for Certiorari to the Circuit Court of Appeals for the Second Circuit.

KELLOGG, ROSE & SMITH,
For Respondent.

ABRAM J. ROSE,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1898, NO. 773.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Petitioner,
against
HEMAN CLARK,
Respondent.

Brief for respondent in opposition to application for certiorari to the Circuit Court of Appeals for the Second Circuit.

This application is made on behalf of the petitioner to review a decision by the Circuit Court of Appeals for the Second Circuit, in favor of the respondent, and against the petitioner, affirming a judgment of the Circuit Court for the Southern District of New York, entered upon the report of a Referee in favor of the respondent and against the petitioner for the sum of $88,084.86.

The recovery had by the respondent was for a balance due under a written contract entered into between the parties for the building of a railroad by the respondent for the petitioner for the sum of $3,954,600.

After the completion of the work, the Chief Engineer made a final certificate, in accordance with the terms of the contract, bearing date March 3d, 1888, by which he certified that it was a final estimate of the amount and value of the work done and materials used in building the railroad, which had been "constructed, built, completed and finished, in all respects, in conformity with the agreements of said contract, except as the said Railroad Company, party of the first part, has, by agreement with said Clark, assumed the construction and completion thereof."

He then certified the amount due;

As per contract price	$3,954,600
From which deductions were made by him, amounting to	104,372 77
Leaving a balance of,	$3,850,227 23
To which he added for items not covered by contract, etc.,	45,571 56
Making a total due to the respondent of	$3,895,798 79

See Record, pages 197–203.

To this amount, as certified by the engineer, the petitioner credited the respondent for materials sold by him to it, and for certain rebates and other matters, the sum of,	34,598 90
Making the sum of	$3,930,397 69

There was no dispute in this case, but that that amount due the respondent had never been fully paid to him, unless by the transactions evidenced by a receipt signed by him on March 9th, 1888. This receipt, and it alone, it was claimed by the petitioner before the Referee and in the Court below, was a bar to any recovery by the respondent in this action.

The respondent, on the other hand, claimed that it was no bar, because the difference between the amount earned and the amount paid, amounting to $71,057.63, had never been released or discharged by him and was still due and owing.

The sum of $71,057.63 claimed by the respondent was made up of the following items:

1st. Deductions made by petitioner for nutlocks furnished by it to respondent and used by him in the construction of the road, the amount not being questioned, only the liability,	$9,558 63
2d. Deductions made by petitioner for non-completion of the railroad on the 1st day of June, 1887, in accordance with an alleged supplemental contract entered into between the parties,	40,000 00
3d. Deductions made by petitioner for moneys paid to subcontractors without right during construction, in all,	21,449 00
Making a total of	$71,057 63

Of this amount the Referee refused to allow the petitioner—

1st. The deduction for nutlocks,	$9,558 63
2d. The deduction for the forfeiture withheld by the petitioner for not completing in time,	40,000 00

The only defense to the recovery of these items by the respondent was the interposition by the petitioner of the receipt as a bar.

The only other item allowed by the Referee was the claim of the respondent under his fifth cause of action, to wit, $2,425 for timber belonging to him, converted by the petitioner to its own use, which claim was not covered by the receipt.

It will be urged in the following argument that the petitioner has not brought itself within the statute allowing writs of certiorari from this Court to the Circuit Courts of Appeal, nor within the well-established rules laid down by this Court in its decisions as to the issuance of such writs.

1st. Because the case affects no public interest, but simply private rights.

2d. Because there is no conflict between the decision in this case and those of this Court and of the State courts; but, on the contrary, the decision in this case is in direct line and full accord with the decisions both of this Court and of the State courts.

3d. Because the real ground of complaint by the petitioner is that the Circuit Court of Appeals did not apply the true rule of the decisions under the facts found by the Referee, and therefore the question sought to be reviewed by this Court is not as to what the law is, but whether upon the particular facts in this case well-settled legal principles were properly applied.

4th. Because no request was made by the petitioner for a full bench on the argument in the Court below.

Point I.

The power of this Court in certiorari will only be exercised where the importance of the questions involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal

and the courts of a State, or some matter affecting the interest of the nation in its internal or external relations, demands such exercise.

In almost every case where an application such as the one now made, is either granted or refused, this Court takes occasion to say that the power of the Court to issue a writ of certiorari to the Circuit Court of Appeals, "should be exercised sparingly and with great caution."

Ex parte Lau Ow Bew, 141 U. S., 583.
Ex parte Woods, 143 U. S., 202.
Chicago and Northwestern R. R. Co. *v.* Osborn, 146 U. S., 354
American Construction Co. *v.* Jacksonville T. K. W. R. Co., 148 U. S., 372.
Forsyth *v.* Hammond, 166 U. S., 506.

The rule of this Court in respect to certioraris to the Circuit Court of Appeals is stated by Mr. Justice Brewer, speaking for the Court, in Forsyth *v.* Hammond (*supra*), as follows: "So it has been that this Court, while not doubting its power, has been chary of action in respect to certioraris. It has said, 'It is evident that it is solely questions of gravity and importance that the Circuit Courts of Appeals should certify to us for instruction; that it is only when such questions are involved, that the power of this Court to require a case in which the judgment and decree of the Court of Appeals is made final to be certified, can be properly invoked." *Ex parte* Lau Ow Bew, 141 U. S., 583-587. *Ex parte* Woods, 143 U. S., 202. Lau Ow Bew *v.* U. S., 144 U. S., 47-58. Am. Cons. Co. *v.* Jacksonville, T. and K. W. R. Co., 148 U. S., 372-383. * * * "We reaffirm in this case the propositions heretofore announced, to wit, that the power of this Court in certiorari extends to every

case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute, would be finally determined in that court. And further, that while this power is coextensive with all possible necessities, and sufficient to secure to this Court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the questions involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the Courts of the State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

Forsyth *v.* Hammond, 166 U. S., 506.

Point II.

There is no conflict between the decision in the case at bar and the decisions of this Court, and of the other Circuit Courts of Appeal and of the State Courts, but, on the contrary, the legal principles applied by the Court below are in direct line and full accord with the decisions of this Court and of the other Circuit Courts and of the State Courts.

FIRST.—The legal principles applied by the Court below in deciding this case are, as stated in the opinions delivered by the learned Judges, as follows:

(*A*). An agreement, which is known to the law as "accord and satisfaction," is a contract, and like all other contracts it needs a consideration to make it valid; without consideration it is *nudum pactum*.

(*B*.) A receipt in full, and payment of the balance stated therein, cannot be sustained as an accord and satisfaction, unless some benefit was thereby secured to the creditor, which, but for the settlement, he would not have had.

(*C*). Payment by a debtor of a liquidated amount, presently due, and to which he has no defense that can be urged in good faith or with color of right, is not by itself a sufficient consideration to sustain the release by the creditor of other liquidated claims against the debtor.

See Opinion Judge Lacombe.

(*D*). A promise by a creditor, having a liquidated and undisputed demand against his debtor, which is wholly due and payable, to discharge the residue upon receiving payment of a part, is, according to all authorities, *nudum pactum* and totally inoperative, because the debtor is under a legal obligation to pay the whole demand.

A demand is not a disputed demand, simply because the debtor refused to pay or recognize it, for if this were true, no case would ever arise for the application of the rule.

It is disputed within the meaning of the rule only when it is so far disputed as to present a "proper case for litigation."

(*E*). In a case where the creditor having two undisputed and liquidated demands against the debtor, and the latter claiming to have cross-demands or counterclaims against the creditor, refuses to pay the creditor's demands unless the validity of the

cross demands is acknowledged and their amount allowed to him by the creditor, the promise to allow the whole amount of the cross demands has no consideration to sustain it, because in contemplation of the law no benefit could accrue to the promisor and no injury to the promisee. The promisor derives no benefit because he allows the whole; the promisee is not injured because he relinquishes nothing.

See Opinion Judge Wallace.

These rules and principles of law, it is submitted, are well settled and quite elementary. They are the rules upon which decision of this case was based in the Court below.

It is hardly necessary to say that they are not in conflict with the decisions of this Court nor of other Circuit Courts of Appeal nor of the State Courts.

In fact, the true ground of complaint on the part of the petitioner is not as to the rules of law laid down by the Circuit Court of Appeals, but that the *facts* shown in this case do not bring it within their application.

What this Court is asked to do is *not* really to resolve *a conflict in the law*, but rather to determine whether, *upon the facts in this case*, well-settled legal principles were properly applied.

As said by Mr. Chief Justice Fuller in *ex parte* Woods (*supra*), the power under Section 6 of the Act of March 3d, 1891, "Could only be properly in- "voked * * * when questions of gravity and " importance were involved.

" This must necessarily be so, in any view, and " especially when it is considered that the Circuit " Courts of Appeal were created for the purpose " of relieving this Court of the oppressive burden " of general litigation which impeded the ex- " amination and disposition of cases of public con- " cern and delayed suitors in the pursuit of justice.

"But in the interest of jurisprudence and uni-
"formity of decision, to use the language of the emi-
"nent jurist and statesman who had charge of the
"bill, provision was made under Section 6 for such
"supervision on our part as would tend to avert
"diversity of judgments and guard against inad
"vertence of conclusions in controversies involv-
"ing weighty and serious matters."

Ex parte Woods, 143 U. S., 202.

It is respectfully submitted that as there is no question in this case of an erroneous decision on a question of law by the Court below, but only whether the peculiar facts in this case brought it within well-settled legal principles, the action being simply between individuals respecting personal and private interests, no questions of gravity and importance were involved within the meaning of the statute; nor is a review of the decision necessary in the interest of jurisprudence and uniformity of decision, nor to avert diversity of judgments and guard against inadvertence of conclusions in controversies involving weighty and serious matters.

Point III.

The legal principles above enunciated were properly applied by the Court of Appeals to the facts in the case at bar.

FIRST.—The whole issue in this case, both upon the law and upon the facts, was referred to a Referee to hear and determine.

In such cases, as said by Judge Lacombe, the rule laid down by this Court is as follows: "As the Court in its judgment ordered his findings to stand

as the findings of the Court, the only questions before this Court are whether the facts found by the Referee sustained the judgment.

"As the case was not tried by the Circuit Court upon a waiver in writing of a trial by a jury, this Court cannot review exceptions to the admission or exclusion of evidence or of findings of fact by the Referee or of his refusal to find facts as requested."

Shipman *v.* Straitsville Mining Co., 158 U. S., 361.
Roberts *v.* Benjamin, 124 U. S., 64.

The only question, then, which was open to the Circuit Court of Appeals for review, was whether or not the facts found by the Referee supported the judgment rendered.

SECOND.—As already said in the statement, two items only, claimed by the respondent to have been erroneously deducted from the amount earned by him under his contract, were allowed by the Referee.

1st. A claim for nutlocks,	$9,558 63
2d. A deduction for not completing the contract in time,	40,000

THIRD.—As to the item for the nutlocks, the Referee made the following findings:

"9. That during the progress of the work the defendant purchased and furnished to the plaintiff and charged him for patented nutlocks, for which the defendant paid $9,558.63.

"10. That the said nutlocks so furnished by the defendant were used by the plaintiff in the construction of the road.

"11. That there are no provisions in the contract which require that the plaintiff and the plaintiff never agreed that he should use in the construction

of the road under said contract any patented nutlocks.

"12. That the plaintiff was ordered by the defendant to put such nutlocks on the road at the beginning of the work.

"13. That he protested against their use, and finally yielded, and used them in track laying upon the promise that the matter of the charge for nutlocks should be adjusted after the completion of the contract."

See Referee's Findings, Record, pages 112–113.

Upon the facts so found the Referee found as conclusions of law:

"3. That the plaintiff is not liable to the defendant for the sum of $9,558.63, the cost of patented nutlocks furnished by the plaintiff to the defendant and used by him in the performance of the said contract.

4. That there was no obligation imposed by the contract upon the plaintiff to furnish and pay for patented nutlocks to be used in the construction of said road.

5. That the plaintiff is not legally indebted to the defendant in any sum whatever for patented nutlocks furnished by the defendant and used in the construction of the road under said contract."

See Referee's Findings of Law, Record, page 118.

FOURTH.—As to the right of the defendant to deduct the $40,000 penalty the Referee found the following facts.

2.

"That immediately after the execution of the said contract the plaintiff proceeded to carry out

and perform the same, and did carry out and perform the same, except a portion thereof otherwise agreed between the parties, and substantially completed the same on or before the 1st day of November, 1887, and the same was duly accepted by the defendant on or about the 1st day of March, 1888."

5.

"That the consideration for the performance of said contract originally mentioned in said contract was $3,914,600, but before the execution of said contract by the plaintiff, by and with the consent of the defendant, the consideration was changed and made $3,954,600."

6.

"That the plaintiff made and entered into a supplemental contract whereby he agreed with the defendant to complete his performance of said contract on or before the 1st day of June, 1887, and to allow the said defendant by way of forfeiture, in case the said railway were not so completed by the 1st of June, 1887, the sum of $40,000."

7.

That the defendant failed to furnish the plaintiff with rights of way, as by said contract it had agreed to do in time to enable the plaintiff to complete his contract prior to the 1st day of June, 1887, or prior to the 1st day of August, 1887, but, on the contrary, delayed the plaintiff in the performance of said contract, at a point upon the said road known as Minneville, until October 27th, 1887, by reason of the neglect, failure and omission of the defendant to obtain the necessary right of way at said point so as to permit the construction of the road and completion of the contract at said point."

8.

"That the plaintiff was thereby prevented from completing his contract on or prior to August 1st, 1887, and also on or prior to June 1st, 1887, by the negligence, omission and fault of the defendant."

See Record, Findings, pages 111–112.

Upon the facts so found the learned Referee held as conclusions of law:

1.

"That the defendant is not entitled to charge the plaintiff, or to retain and deduct from the amount earned and payable to the plaintiff under said contract the sum of $40,000 as a forfeiture or liquidated damages for not completing the contract on June 1st, 1887."

2.

"That under the facts proved in this case, the plaintiff is not legally liable to the defendant for any damages for failure to complete the contract within the contract time of the time agreed upon, for the reason that the plaintiff was prevented by the negligence of the defendant, and its omission to procure the neces sary right of way, completing the work in such time."

See Record, Findings, pages 117-118.

FIFTH.—The only defense interposed by the petitioner to the payment of these just claims, which were a balance of the contract price earned by the respondent for work actually done, was a receipt which the petitioner claimed amounted to an accord and satisfaction between the parties, and was a bar to the respondent's recovery.

That receipt is set out in full both in the petition for the writ and in the brief of the counsel for the

petitioner, as well as in the opinion of the Circuit Court of Appeals, and need not be set out *in extenso* here.

The following is a summary statement of the transactions, as stated in it.

Summary.

Amount earned under contract fixed by engineer,		$3,895,798.79	(not disputed.)
Amount allowed for extras fixed by engineer,		34,598.90	"
Total,		$3,930,397.69	"
Transportation fixed by contract	$50,000	(not disputed.)	
Amount retained as security for liens, etc.,	40,000	"	
Payment in money, etc.,	3,617,306.50	3,707,306.57	"
Balance,		$223,091.12	
Payment for nutlocks,		$9,558.63	(amount not disputed.)
Retained for forfeiture,		40,000.	(amount not disputed fixed by contract.)
		$49,558.63	
Balance,		$173,532.49	(not disputed.)

The transaction as shown by the receipt was in effect as follows:

The petitioner conceded that the balance earned under the contract by the respondent, after deducting all undisputed credits, amounted to	$223,091 12
But there were two items as to which there was no dispute as to the amount, but which the petitioner deducted from the balance due the respondent, amounting to	49,558 63
Leaving the conceded balance due the respondent at all events,	$173,532 49

In the payment of the balance of $173,532.49 the petitioner did not pay one penny more than it was legally bound to pay, and which amount it is conceded was due to the respondent. But the petitioner claimed that the respondent, in consideration of the payment of the sum concededly due, agreed that he would relinquish and release all his claim to the items deducted for nutlocks and overtime, amounting to $49,558.63.

In the Court below the respondent invoked the principles of law above mentioned, and claimed that the receipt did not amount to an accord and satisfaction, and was no bar to the respondent's recovery.

1st. Because, as to all the items paid, they were wholly liquidated and undisputed in amount.

2d. Because the payment of those liquidated undisputed items formed no consideration for the release of the balance of the claim.

3d. That the rule that payment by a debtor of a part of his debt is not a satisfaction of the whole applied, and that an agreement to release under such circumstances was *nudum pactum* and unenforcible.

SIXTH.—The court below held that the facts found by the Referee brought this case directly within the principles above enunciated; and reference need only be made to the opinons of the learned Judges of the Court below to show the reasoning upon which they held those rules apppli-cable to this case.

Judge Lacombe, in his opinion, reasoned as follows: "It appears, as has already been shown, that at the time the receipt in full or proposed "accord" was prepared and submitted to plaintiff for his acceptance, the amount earned under the contract ($3,895,798.79) was a claim against the defendant "liquidated" in the strictest meaning of the term. Not only was it undisputed in the sense that defendants were willing to pay, it but it was no longer open to dispute, even if they wished to dispute it. As to the work called for by the contract, that instrument bound the defendant to pay the sums shown by the final estimate to be due whenever the Chief Engineer should certify to proper completion, and he had so certified.

The price for such work was fixed by the contract itself. As to the extra work, the Chief Engineer had certified that he had ordered it—that it was done and had fixed and determined the price for it—and the contract bound the company to pay the price so fixed. Therefore, except for the single defense of payment, the company was wholly without defense to the claim for that sum, $3.-895,798.79; it could not contest it in court "with good faith" nor with "any color of right." Had plaintiff before March 9th, 1888, brought suit for the balance of such sum remaining unpaid, after crediting the defendant with all the items of payment it asserted it was entitled to charge, the railroad company could not, assuming that its officers were conscientious, even have verified an answer which could have raised any issue or delayed plaintiff's entry of judgment beyond the time necessary to notice a motion for judgment upon the answer as frivolous. As to the items of payment, which the company insisted upon, all were and always have been conceded by plaintiff, except the cost of nut locks and the overtime penalty. When, therefore, both these items were credited to the defendant in

the receipt, it parted with nothing—not even a right to litigate—in agreeing to pay and in actually paying the balance remaining of the liquidated amount earned under the contract after deducting all alleged credits for payment. Hence there was no consideration moving to the plaintiff by reason of the payment of this sum on March 9th, 1888, and unless some other benefit to plaintiff can be found to support it, his agreement implied by receipt in full, to abandon all claim to the cost of nutlocks and overtime charged, was without consideration and *nudum pactum*.

By reference to the receipt in full, which is set forth in the 13th Finding of Fact, it will be found that the instrument disposed of another item not hereinbefore referred to in these terms; "And whereas the further sum of $34,598.90 should be credited to said Clark for materials sold by him to said company, and certain rebates and other matters of that description, etc. etc." This sum is, by the statement of account set forth in such receipt, credited to Clark, and is included in the $173,532.49, paid to him upon his signing such receipt. From what has been said before, it is plain that if at the time of the transactions relied upon, as showing accord and satisfaction, this sum of $34,598.90, so allowed to Clark, represented an unliquidated item, the amount of which he would have to establish by evidence in case he had sued to recover it, its allowance to him upon the settlement of March 9th, 1888, would be a sufficient consideration to uphold that settlement against him as an accord and satisfaction of all his claims.

The findings of fact do not give much information as to the details of this item.

It is suggested that the testimony in the case shows that it covered surplus materials, such as rails, spikes, bolts, etc., which Clark had brought on the line of the work, but had not needed; that it being more advantageous to sell them where they lay than to transport them elsewhere, plaintiff had agreed with defendant that it would take them off his hands, had made "a trade outside of the contract." But with the testimony this Court has nothing to do. It sufficiently appears from the findings that part at least of this sum was for "materials sold by (Clark) to said Company." From the engineer's certificate, which is included in

the findings, it appears that this item represented no part of the work specified under the contract, and no part of the extra work and materials ordered by him; that it was not included in his certificate, nor in the final estimate; that he made no decision about it one way or the other, and apparently that he never undertook to pass upon it. Therefore, it was not liquidated by the original contract, nor by any action of the engineer thereunder. Indeed, it is plain to a demonstration from the findings, that the item in question was not included either in the original contract or in the extra work, and must represent an additional and independent contract of sale. What the terms of that contract of sale were the findings do not disclose; if they were of such a character as to leave the price of the article sold open to future adjustment, and if no binding agreement of the parties had subsequently adjusted such price; in other words, if on March 9th, 1888, the situation was such that the plaintiff put to his suit could have recovered this item only by proof of amount furnished or of reasonable value, or of both, then it was an unliquidated item; and its allowance to the plaintiff on settlement would be a good consideration to support the contract of accord and satisfaction. If, on the contrary, before that time, either when the independent contract was made or later, the parties had settled on the quantities delivered and had agreed upon the price, not by some mere expression of willingness to pay a particular amount, but in such a way as to preclude further litigation "in good faith" or "with any color of right"—then the allowance and payment of the $34,598.90 would not constitute good consideration.

The only light we have upon this question is found in a single clause—indeed, practically in a single word—of the 14th finding of fact: "That said receipt and paper contained an accurate, truthful and undisputed account of all dealings between said parties except in the matter of the forfeiture," etc.

It is quite manifest from the findings and conclusions that the Referee uses this word "undisputed" as synonymous with *liquidated*. He was evidently satisfied from the testimony that the prior transactions between the parties were such that this sum was not more open to dispute than was

the sum of $3,895,798.79 to which the Chief Engineer had certified. By what process it was so liquidated does not appear in the findings, and no one seems to have asked the Referee to find the facts more specifically. We must take his finding, therefore, as conclusive upon the question, and assume that, either by agreeing for a price in advance or subsequently by entering into some binding agreement as to the sum to be paid, the defendant had lost its right to throw the plaintiff into court as to that item. Its allowance and payment, therefore, could not constitute a good consideration for the alleged accord and satisfaction.

Judge Wallace, in his opinion, said:

"The Referee found, as conclusions of law: (1) That at the time of signing the receipt the plaintiff was not indebted to the defendant upon the item for nutlocks; (2) that the plaintiff was not liable for the item of $40,000 debited to him for failure to complete the railroad by June 1st, 1887; (3) that when it rendered the statement of account the defendant was indebted to the plaintiff in the sum of $49,558.63, in addition to the sum of $173,532.49 paid by it upon receiving the receipt; (4) that the delivery of the receipt and the acceptance of the payment by the plaintiff did not constitute a valid payment or accord and satisfaction of the said sums of $9,558.63 and $40,000, or either of them, or any part of them; and that the plaintiff was entitled to recover the sum of $49,558.63, with interest from March 9th, 1888. The assignments of error thus raised the question whether the acceptance of $173,532.49 by the plaintiff upon a promise to receive it in full of all his demands was a settlement and satisfaction of his demands against the defendant, which amounted to $49,558.63 more than that sum. If there was no consideration for his promise, the conclusion of the Referee was correct. If there was a sufficient consideration for it, the assignments of error are good. * * * It is conceded that, as to the part of the plaintiff's demand established by the certificate of the engineer, it was a liquidated and undisputed demand against the defendant in the sense in which these terms are used in considering the validity of a promise to accept a part payment in satisfaction of the whole demand.

The other part of the plaintiff's demand that for the materials, etc., purchased of plaintiff by defendant was, according to the Referee's finding, undisputed in fact between the parties, and this being so, it is quite unnecessary to inquire whether it was originally one in respect to which there might have been a fair difference of opinion between the parties as to the amount due.

The statement of account rendered by the defendant is evidence as against the defendant not only that it was an undisputed demand, but one the amount of which had been ascertained by the parties. If the amount had been ascertained, it was a liquidated demand. As no facts appear in the findings of the Referee to the contrary, it is to be concluded that this part of the plaintiff's demand was also liquidated as well as undisputed by the defendant. The case is not precisely one where the debtor refuses to pay the whole of an undisputed and liquidated demand, and exacts a promise from his creditor to receive part in satisfaction of the whole. Strictly it is one where the creditor having two undisputed and liquidated demands against the debtor, and the latter claiming to have cross demands or counterclaims against the creditor, refuses to pay the creditor's demands unless the validity of the cross demands is acknowledged and their amount allowed to him by the creditor. By the statement of account and the receipt annexed to it the defendant, in fact, took this position and notified the plaintiff that as a condition to paying the demands which it conceded to be due the plaintiff, the latter must allow and deduct the debited items for the nutlocks and the forfeiture. Upon this state of facts a promise to allow the whole amount of the cross demands has no consideration to sustain it, because, in contemplation of the law, no benefit could accrue to the promisor and no injury to the promisee.

The promisor derives no benefit, because he allows the whole; the promisee is not injured, because he relinquishes nothing."

It will thus be seen that both the Judges are entirely in accord as to the law applicable to the case, which, reduced to a concrete form, is simply that an agreement without consideration is *nudum pactum* and unenforcible.

It will also be seen that both of the Judges concur in the view that, as a matter of fact, there was no consideration for the release or discharge of his claims by the respondent.

SIXTH.—Upon the receipt, as an accord and bar to the respondent's recovery, the petitioner rested practically its entire defense.

When asked whether it was just and right that the respondent should be mulcted in the sum of $40,000 for not completing the road in time, when the conceded testimony showed and the Referee found that the fault was that of the petitioner in not obtaining rights of way, its only reply was, the respondent has lost his right to payment by reason of the receipt.

When asked whether it was just and reasonable, and whether there was any provision of the contract warranting it in taking from the respondent $9,558.23 for nutlocks, its only answer was, the receipt prevents the payment.

It was read, reread and read again at every stage of the trial, and it was claimed constantly by the petitioner that, no matter how just were the claims of the respondent, the receipt was a bar to them all.

It is claimed that the receipt stands as payment, though no payment has been made. That it stands for an account stated, though no account had been rendered and no statement made; that it stands for an accord and satisfaction without the slightest proof of either the accord or satisfaction.

The defense, it is submitted, is not a just one, and the Court below properly found that it also was not a legal one.

It is believed that this Court will have no difficulty in arriving at the conclusion that the rules of law were properly applied by the Court of Appeals to the facts found in this case.

Point IV.

None of the cases cited and relied upon by the petitioner conflicts with the decision in the case at bar.

The decisions of this Court in the cases of U. S. *v.* Child, 12 Wall., 232, and U. S. *v.* Adams, 7 Wall., 463, as well as the other cases in this Court, relied upon by the petitioner, were distinguished and held not applicable to the facts in this case, in the opinion of Judge Lacombe, as follows: "Analysis of the leading reported cases will show that although it is not always discussed in the opinion, a valuable consideration is found to be present wherever a defense of accord and satisfaction has been sustained. The brief filed by the learned counsel for plaintiff in error presents such a comprehensive selection of authorities that it will be sufficient to refer to its citations.

First to be considered is a group of decisions of the U. S. Supreme Court, where claimants for supplies furnished to the Government were held fore closed by receipt in full and acceptance of part of their original claims. It should be remembered that the U. S. Treasury pays only out of appropriations and upon audit. There being many claims for military stores furnished during the Civil War, Congress created a special board to pass upon their validity and amount. None was required to bring his claim before such board, but if he did, payment was at once secured to him of whatever amount the board might find due, out of a special appropriation made for that purpose. Payment on all of these claims out of the ordinary appropriations had been suspended by order of the Treasury Department. "From the time the Secretary issued his order suspending the payment, * * * they must be regarded as claims disputed (*i. e.*, the whole claim) by the Government; and unless the board had been constituted, could have been adjusted only by Congress or the Court of Claims" (7 Wall., 463). In all these cases the amounts paid in settlement were unliquidated, since but for the finding of the board, the Government could have litigated them all in good

faith, and in giving up resort to the Court, at the same time going to the expense of constituting a special tribunal to adjust the claims, and securing the more expeditious payment of what might be found due, there was certainly abundant consideration to sustain the settlement. U. S. *v.* Adams (1868), 7 Wall., 463; U. S. *v.* Child (1870), 12 Wall., 232; U. S. *v.* Justice (1871), 14 Wall., 15. In Sweeny *v.* U. S. (1872), 17 Wall., 77, the claim was clearly unliquidated as to every part of it, involving the question of reasonable compensation; a circumstance which appears from the opinion: "Enough appears to satisfy the Court that the charter party was superseded and that the claim, in fact, was for a *quantum meruit*, and as such that it was a proper subject of compromise." In U. S. *v.* Martin (1876), 94 U. S., 400, plaintiff, a laborer, claimed extra pay under some construction of the eight-hour law. He presented his claim to the auditor in 1873 and received $205, giving a receipt in full. He subsequently brought suit for the balance in the Court of Claims. The payment of the $205 was a sufficient consideration, since the entire claim was fairly disputable in the courts. In Baird *v.* U S. (1877), 96 U. S., 430, plaintiff had a contract with the Government to furnish certain locomotives. The stipulated price was, first, a fixed sum for each locomotive; second, any advance there might be, after a certain date, in cost of labor and materials; and third, any damages resulting from giving the Government's order preference over others. The fixed price had been claimed and the damages recovered by suit. The plaintiff presented a claim for $151,588 for entire advance in cost which was audited and allowed for $97,507, and plaintiff informed of the principles upon which the adjustment was made. He took draft for the amount and collected it. Held an accord and satisfaction. Manifestly every dollar of the claim of $151,588 was unliquidated and susceptible of liquidation only by consent of the Government or by the courts. Assent to an adjustment at $97,507 was a valuable consideration. Pray *v.* U. S. (1882), 106 U. S., 594, is not in point, and in Boofington *v.* Tuyes (1886), 120 U. S., 198, there was abundant consideration in the abandonment of a right to appeal. In Fire Ins. Assn. *v.* Wickham, 141 U. S., 579, premature payment was held a good consideration.

In Battle *v.* McArthur, 49 Fed. Rep., 715, plaintiff had a contract for grading a railroad, compensation was at fixed prices for the units of the different kinds of work done. There had been a long dispute as to the classification of hardpan by the engineers, *i. e.*, as to how many units of rock and earth excavation respectively should be paid for. After the work was done, and the amount of final estimate was being settled on, a conference was had, of which Thayer, J., says: "The percentage of loose rock excavation thus demanded was not allowed, but it caused the Chief Engineer to raise the classification some twenty per cent., and that increased entered into the final estimate." Here was a concession and payment which certainly constituted a good consideration."

Every one of the decisions in the various States, cited upon the petitioner's brief in the Court below was also carefully examined and distinguished.

In every one of those cases, as pointed out in the opinion of the Court below, *some consideration was present* either by the giving up of some right which the debtor had or the acceptance by the creditor of some benefit which he would not have received, except for the settlement and compromise made.

Thus it will be seen that the Court below fully recognized the rule of law that the settlement and adjustment of a claim upon a consideration, would be a bar to further recovery by the creditor against the debtor.

While recognizing this rule, they held that the facts found by the Referee showed that there has been no accord and satisfaction between the parties, *because no consideration for the release of any claim passed from the petitioner to the respondent.*

Point V.

The fact that only two Judges composed the Court rendering the decision sought to be reviewed is no ground for the issuance of a writ by this Court.

It is not claimed by the petitioner that any request for a full Bench was made. If it had been, the request undoubtedly would have been granted. The petitioner took the risk and saw fit to argue the case before two Judges.

As already said, the Judges in no way differ as to the law applicable to the facts found by the Referee.

In the opinion of Judge Wallace, the finding of the Referee that the claim for materials purchased of the respondent by the petitioner was undisputed in fact between the parties, made it unnecessary to inquire whether it was originally one in respect to which there might have been a fair difference of opinion between the parties as to the amount due, and that the statement of account rendered by the petitioner was evidence as against the petitioner not only that it was an undisputed demand, but one the amount of which had been ascertained by the parties, and that if the amount had been ascertained, it was a liquidated demand.

See Opinion of Judge Wallace.

Judge Lacombe, in his opinion, inclined to the view that it was not necessary even to go to the extent indicated by Judge Wallace, but that the finding of the Referee that the receipt contained a "truthful, accurate and *undisputed* account" showed that he was evidently satisfied from the testimony that the prior transactions between the parties were such that the sum of $34,598.90 was

not more open to dispute than was the sum of $3,895,798.79, to which the Chief Engineer had certified; that the finding must be taken as conclusive upon the question and assumed that either by agreeing for a price in advance or subsequently by entering into some binding agreement as to the sum to be paid the petitioner had lost its rights to throw the respondent into court as to that item.

See Opinion of Judge Lacombe.

Both of the learned Judges agreed in the conclusion that there was no consideration for the alleged accord and satisfaction.

Point VI.

The application for the writ of certiorari should be denied.

Respectfully submitted.

KELLOGG, ROSE & SMITH,
Attorneys for the Respondent,
120 Broadway,
New York City.

ABRAM J. ROSE,
Of Counsel.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899,

No. 256.

CHICAGO, MILWAUKEE and ST. PAUL RAILWAY COMPANY,

Petitioner,

against

HEMAN CLARK,

Respondent.

BRIEF FOR RESPONDENT.

Statement.

This case comes before this Court upon a writ of certiorari to the Circuit Court of Appeals of the United States for the Second Circuit to review an order of said Circuit Court of Appeals affirming a judgment entered upon the report of a referee for $88,084.86 by the Circuit Court of the United States for the Southern District of New York in an action brought by Heman Clark, as plaintiff, against the Chicago, Milwaukee and St. Paul Railway Company, defendant.

See Judgment, pages 229-230.
See Order of Circuit Court of Appeals.
See Writ of Certiorari.

This action was brought to recover on six different causes of action.

1st. To recover under a written contract entered into between the plaintiff and the defendant a balance unpaid of $71,057.63.

2d. To recover upon *quantum meruit* the sum of $127,652.81 for work done in excess of that called for by the contract and which was not ordered under the terms of the contract in writing.

3d To recover damages for freight paid to avoid delays, the sum of $2,196.

4th. To recover the sum of $127,652.81 for fraudulent representations made by the defendant as to the quantity of work to be done under the contract.

5th. To recover the value of timber converted by the defendant to its own use, the sum of $2,425.

6th. To recover for damages and increased cost occasioned by the giving of wrong grades, the sum of $89,833.33.

By consent of the attorneys for the plaintiff and and the defendant, an order of reference was entered on the 19th day of October, 1894, referring all the issues in this action to William G. Choate, as Referee, to hear and determine the same.

See Order of Reference, pp. 45 and 46.

The Referee appointed by that order having declined to serve, an order was entered on the 3d day of January, 1895, ordering that George Hoadly be substituted as Referee in the place and stead of said William G. Choate, and that "this action, and all the issues therein, be, and the same hereby are, referred to the said Hon. George Hoadly, as sole Referee, to hear and determine the same."

See Order, pp. 47-48.

The case came on for trial before the said Referee, and a judgment was rendered by him in favor of the plaintiff and against the defendant for the sum of $80,479.35, with interest and costs.

A motion for a new trial under the rule adopted February 5th, 1877, in the Southern District of New York, was made by the defendant and overruled, and the report of the Referee confirmed by Judge Addison Brown.

Judgment was entered upon the report of the Referee on the 6th day of April, 1898, in favor of the plaintiff, for the sum of $88,084.86.

See Judgment, pp. 229-230.

A writ of error was sued out by the defendant to review the judgment entered, by the Circuit Court of Appeals for the Second Circuit, which Court affirmed the judgment.

The defendant then petitioned this Court for a writ of certiorari, which was granted, and, in pursuance of said writ, this case now comes before this Court.

Pleadings.

The only items allowed by the Referee in this case were the sum of $40,000, deducted by the defendant from the balance due the plaintiff as overtime penalty for the alleged non-completion of the contract within the time stipulated; the sum of $9,558.63, deducted by the defendant for nutlocks furnished by it to plaintiff and used by him in the construction of the road, and the item of $2,425 for timber belonging to the plaintiff, converted by the defendant to its own use.

It is only necessary, therefore, to call the Court's attention to the causes of action embracing these

three items, to wit, the first and fifth causes of action.

For a first cause of action the complaint alleges the making of a contract between the plaintiff and the defendant on the 6th day of March, 1896, for the building of a line of railroad for the defendant, extending from a point in the City of Ottumwa, Iowa, to Harlem Station, in Clay County, Missouri, a total distance of 202.8 miles, in accordance with the plans, profiles and specifications made by the chief engineer of the defendant and under his supervision and direction.

That for the work provided to be done under said contract, the defendant agreed to pay the sum of $3,954,600, subject, however, to the right of deduction of $50,000 by the defendant for transportation as provided in said agreement.

That the plaintiff proceeded to execute and perform said contract and prior to the commencement of this action had fully completed and performed the same so far as permitted by the said defendant and excepting such portions as were not required by it to be done thereunder.

That the said work had been accepted by the defendant and its Chief Engineer, who had certified to the proper performance thereof, and that the amount earned thereunder, after deducting the price of work not done and adding thereto certain allowances and rebates, as agreed upon, was the sum of $3,930,397.69/100.

That there had been paid on account of said contract the sum of $3,859,340.06/100, leaving a balance due of $71,057.63/100.

See Amended Complaint, pages 32-33, folios 95-99.

For a fifth cause of action, the complaint alleges that the plaintiff was the owner of 97,000 feet B.

M. of bridge timber of the full and reasonable value of $2,425, which said timber had been brought and placed upon the line of the work for his use in completing the said contract.

That the defendant, without the knowledge and consent of the plaintiff, took possession of the same and converted it to its own use, to his loss and damage in the sum of $2,425.

See Amended Complaint, page 36, folio 107.

The answer of the defendant,—

1st. Admits the making of the contract and the commencement of the performance thereof and its acceptance by the defendant and its Chief Engineer.

2d. Denies the amount earned and the balance alleged to be due thereunder.

It then sets up the following affirmative defenses:

1st. That under the provisions of the contract, the Chief Engineer had certified for the work done thereunder, that the plaintiff was entitled to $3,895,798.79, from which the defendant claimed the right to deduct for transportation, the sum of $50,000; and the further sum, by way of forfeiture for non-completion in the contract time, the sum of $40,000; and that it had paid to the plaintiff, in money, material, labor and transportation, a sum in excess of the amount certified.

2d. That subsequent to the making of the final certificate by the chief engineer and upon March 9th, 1898, an account was stated and agreed to between the parties as the amount earned and the amount to be credited for payment under the contract, and the balance due the plaintiff was fixed at

the sum of $173,532.49, which said sum was paid by the defendant and received by the plaintiff.

3d. That on the 9th day of March, 1888, the plaintiff acknowledged in writing that he had received payment of said sum of $173,532.49 in full satisfaction of all claims and demands of every kind, name and nature arising from or growing out of said contract, except the sum of $40,000 retained for future payments, and executed a receipt and acknowledgment for the same.

That the said sum of $40,000 so retained had been paid by the defendant for the purposes certified in said receipt and agreement, and the sum of $521.75 in excess thereof, for which sum an affirmative judgment was demanded.

See Amended Answer, pages 20 to 30, folios 60 to 88.

The reply of the plaintiff is a general denial of all the facts stated in the amended answer constituting a counterclaim.

See Reply, page 19.

To state the issues more briefly: The plaintiff under his first cause of action claims the sum of $71,057.63 as a balance due under the contract, together with the sum of $2,425 the value of timber belonging to him and taken and used by the defendant.

The defendant practically admits performance of and compliance with the terms of the contract, but sets up the following affirmative defenses:

1st. Payment in full.

2d. An agreement giving it the right to charge the plaintiff with the sum of $40,000 forfeiture or

damages for not completing the contract within the contract time.

3d. An account stated between the plaintiff and the defendant whereby a balance was found which has been paid.

4th. A plea of accord and satisfaction growing out of the execution of a receipt in full.

5th. The payment of the sum of $40,000 retained by the defendant for specific purposes and the sum of $521.75 in excess thereof.

Facts.

On March 6th, 1896, a written contract was entered into between the defendant, the Chicago, Milwaukee, and St. Paul Railway Company, and Heman Clark, the plaintiff, wherein and whereby it was agreed that said Clark should construct and fully complete, ready for rolling stock, a line of railroad for the defendant from Ottumwa, Iowa, to Harlem Station (afterwards changed to Randolph's Bluff), Clay County, Missouri, a total distance of 202.8 miles.

The work so to be done was to be in accordance with the plans, profiles and specifications made, or thereafter to be made, by the chief engineer of the defendant, and under his supervision and direction and to his satisfaction.

The price originally bid for the work was $3,990,000, but was afterwards adjusted at the rate of $19,500 per mile, which is $3,954,600 and almost equal to a deduction of $40,000 from the original bid.

The contract price inserted in the contract prior to its execution by the plaintiff was $3,914,600 and the contract was signed in that condition by the defendant.

But the plaintiff discovered the error and by consent of the defendant the lump sum to be paid was fixed at $3,954,600 before execution by the plaintiff.

The contract originally provided that the work should be completed by the 1st day of August, 1887.

The Referee, however, found that that provision was modified by a supplemental agreement to the effect that if the railroad was not completed by the 1st day of June, 1887, a forfeiture of $40,000 from the contract price should be imposed upon the plaintiff.

The finding of the Referee was not based on a written agreement between the parties, but upon correspondence testified to at the trial, which the defendant claimed established a contract.

The only evidence of the plaintiff's assent was parol evidence as to a telegram claimed to have been sent by him, which had been lost, and as to which there was no proof that he had sent it or authorized its sending. The plaintiff expressly denied that he had sent it or authorized it.

But whether the agreement to forfeit $40,000 was made or not, the evidence conclusively shows and the Referee expressly found that the failure to complete by the 1st day of June, 1887, was wholly due to the failure of the defendant to provide the rights of way so as to enable the plaintiff to complete his work.

See Referee's Findings, p. 112, fols. 335–336.

The obligation to furnish rights of way was expressly imposed upon the defendant as a condition to be performed by it.

The contract provides "For and in consideration "of the payments, covenants and agreements of

"the party of the second part to be by said "second party made, kept and performed as here- "inabove set forth, the party of the first part here- "by covenants and agrees to furnish, at his own "cost and expense, and at such time or times as "not to delay the execution of the work in this "agreement mentioned and referred to, all the "lands now or hereafter marked out and desig- "nated by the said first party's chief engineer for "right of way, borrow pits, waste banks and sta- "tion grounds of all kinds as the said lands may be "required for the construction of the railroad cov- "ered by this agreement."

See Contract, p. 169, fol. 506.

The plaintiff continually called upon the defendant to furnish rights of way, but it failed to do so.

The testimony shows that there were twenty-five places where, until after June 1, 1887, the rights of way had not been procured.

At a place called Minneville the right of way, for a distance of 2,750 feet, was not procured until October 27, 1887.

Testimony Hegeman, p. 239.

The next day, after the final right of way had been furnished, the contract was completed, and the first train ran over the line on November 1, 1887.

See testimony of Russell, p. 378, fol. 1133.

After the completion of the work, in accordance with the terms of the contract, the Chief Engineer of the defendant made a final certificate, bearing date March 3d, 1888, which was presented to it but not to the plaintiff.

By that certificate the Engineer certified that it was a final estimate of the amount and value of the work done and materials used by plaintiff in building the railroad, including all extra work done by him, and that the said railroad agreed to be built had been "constructed, built, completed and fin-" ished, in all respects, in conformity with the " agreements of said contract, except as the said " Railroad Company, party of the first part, has, " by agreement with said Clark, assumed the con-" struction and completion thereof."

He then certified the amount due:

As per contract price,	$3,954,600 00
From which deductions were made by him amounting to	104,372 77
Leaving a balance of	$3,850,227 23
To which he added for items not covered by contract, etc.;	45,571 56
Making a total due to the plaintiff,	$3,895,798 79
See Certificate, pp. 197–203.	
To this amount, as certified by the engineer, the defendant credited the plaintiff for materials sold by him to it, and for certain rebates and other matters, the sum of	34,598 90
Making the sum of	$3,930,397 69

There was no dispute in this case, but that this amount due the plaintiff was never fully paid to him, unless by the transactions evidenced by a receipt signed by him on March 9th, 1888. THIS RECEIPT, IT APPEARS, WAS SIGNED IN NEW YORK BY THE PLAINTIFF BEFORE HE HAD RECEIVED OR SEEN THE CERTIFICATE MADE UP BY THE CHIEF ENGINEER, AND BEFORE HE HAD RECEIVED ANY FINAL ACCOUNT OF THE ITEMS MENTIONED IN THE

RECEIPT OR HAD ANY KNOWLEDGE OF THEIR CORRECTNESS.

The first time that the final estimate of the Engineer was seen by Mr. Clark was upon the trial of this action before the Referee. It had been delivered to the defendant, and with the final accounts had been sent by the president of the defendant to Mr. Bond, its vice president, who had an office in New York. Mr. Bond simply sent the receipt with the check for the balance shown by the receipt to the plaintiff, and did not forward the final accounts nor the Engineer's certificate. This was expressly admitted by Mr. Bond on the trial.

This receipt, it was claimed by the defendant, was a bar to any recovery by the plaintiff in this action for any claims.

The plaintiff, on the other hand, claimed that it was no bar, because the difference between the amount earned and the amount paid, amounting to $71,057.63, had never been released or discharged by him and was still due and owing.

This sum of $71,057.63 was claimed by the plaintiff in his first cause of action and is made up of the following items:

1st. Deductions made by defendant for nut locks furnished by it to plaintiff and used by him in the construction of the road, and for which the defendant rendered bills, from time to time, the amount not being questioned only the liability.....	$9,558 63
2d. Deductions made by defendant for non-completion of the railroad on the first day of June, 1897, in accordance with an alleged supplemental contract entered into between the parties.....	40,000 00

3d. Deductions made for moneys paid to subcontractors without right, including the moneys paid in compensation for the death of a brakeman during construction, in all.....	21,499 00
Making a total of.....	$71,057 63

Of these amounts the Referee has refused to allow the defendant:

1st. The deduction for nut locks....	$9,558 63
2d. The deduction for the forfeiture withheld by the defendant for not completing in time.....	40,000 00

The amount retained as payment for the nut locks does not appear specifically in the receipt, but it is included in the sum of $3,626,865.20, claimed to have been paid by the defendant on account of the contract.

This was expressly so found by the Referee.

See Findings, p. 113, fol, 339.

The $40,000 appears specifically as deducted in the receipt.

The only defense to the recovery of these items by the plaintiff was the interposition by the defendant of the receipt as a bar.

The only other item allowed for by the Referee in this case was the claim of the plaintiff under his fifth cause of action, to wit: $2,425 for timber belonging to him converted by the defendant to its own use.

All the other causes of action aggregating $232,489.49 have been disallowed by the Referee.

The claims under those causes of action were for increased cost occasioned to the plaintiff in the prosecution of the work by the wrongful act and fault of the defendant, its servants and agents, in

giving him wrong grades and in compelling him to do more work than required by the terms of the contract and in a more expensive manner.

As to the items allowed there is no claim or pretense of payment, except as evidenced by the receipt.

It will be argued by the plaintiff:

1ST. THAT THERE IS NO QUESTION OPEN FOR REVIEW BY THIS COURT BECAUSE THIS CASE IS A COMMON LAW ACTION, AND WAS NOT TRIED BY A JURY, NOR BY THE COURT WITHOUT A JURY, UNDER THE PROVISIONS OF SECTIONS 649 AND 700 OF THE REVISED STATUTES OF THE UNITED STATES, BUT THAT THE JUDGMENT RENDERED WAS UPON THE DECISION OF A REFEREE ACTING AS A COMMON LAW ARBITRATOR.

2D. THAT EVEN IF THE JUDGMENT RENDERED BE CONSIDERED IN ANY SENSE A JUDGMENT UPON A TRIAL BY THE COURT, THE ONLY QUESTION WHICH BY ANY POSSIBILITY CAN BE PRESENTED TO THIS COURT IS WHETHER THE FACTS FOUND BY THE REFEREE SUPPORT THE JUDGMENT RENDERED.

3D. THAT THE JUDGMENT RENDERED IS FULLY SUPPORTED BY THE FACTS FOUND BY THE REFEREE.

4TH. THAT THE RECEIPT OFFERED IN EVIDENCE BY THE DEFENDANT IS NOT A BAR TO THE RECOVERY OF THE PLAINTIFF FOR THE TWO ITEMS ALLOWED BY THE REFEREE UNDER THE FIRST CAUSE OF ACTION.

5TH. THAT EVEN IF THIS COURT WERE AT LIBERTY TO REOPEN AND REEXAMINE ALL THE FINDINGS OF FACT MADE BY THE REFEREE THE EVIDENCE TAKEN UPON THE TRIAL NOT ONLY FULLY SUPPORTS THOSE FINDINGS IN EVERY PARTICULAR, BUT CONTRARY FINDINGS WOULD BE AGAINST THE WEIGHT OF EVIDENCE.

ARGUMENT.

Point I.

There is no question open for review by this Court, because this case is a common law action and was not tried by a jury nor by the Court without a jury under the provisions of Sections 649 and 700 of the Revised Statutes of the United States, but before a referee acting as a common law arbitrator.

1ST. THIS ACTION WAS A COMMON LAW ACTION TO RECOVER A SUM OF MONEY CLAIMED TO BE DUE to THE PLAINTIFF UNDER AND BY VIRTUE OF A CONTRACT MADE AND ENTERED INTO BETWEEN HIM AND THE DEFENDANT, AND FOR DAMAGES BY REASON OF THE WRONGFUL ACTS OF THE DEFENDANT, ITS SERVANTS AND AGENTS, IN THE PROSECUTION OF THE WORK.

On the 19th day of October, 1894, the following stipulation was made by the attorneys for the parties:

> "It is hereby stipulated and agreed that "the above-entitled action and all the issues "therein be referred to the Hon. William G. "Choate, AS SOLE REFEREE TO HEAR AND DE-"TERMINE THE SAME. It is further stipulated "and agreed that judgment upon the Report "of such Referee shall not be entered here-"in until after ten days' notice of the filing "of the report of the Referee and of the "judgment proposed to be entered thereon "shall have been given to the opposite "party."

See Stipulation, page 46.

On this consent an order was entered on the said day referring this action to Hon. William G. Choate AS SOLE REFEREE TO HEAR AND DETERMINE THE SAME.

See Order, page 45.

Mr. Choate declined to serve as Referee, and subsequently an order was entered on the 3d day of January, 1895, in which the previous order was recited, and the Hon. George Hoadly was appointed Referee in this action in his place and stead.

The only consent to the entry of the second order was the stipulation appended to it to the effect that the parties consented to the entry of the order.

See Order, pages 47 to 48.

It was under this second order that the trial of this action was had and the decision upon which the judgment in this action was entered was rendered.

The defendant, in order to avoid the binding effect of the decision and, if possible, to obtain a review of the judgment, moved for a new trial under the rule of the Circuit Court in the Southern District of New York, passed February 5th, 1877, before Hon. Addison Brown, prior to the entry of the judgment. On the 6th day of April, 1898, a judgment or decision was signed by Judge Brown overruling the motion and adopting the findings and rulings of the Referee as the findings and rulings of the Court.

This decision was simply formal on the part of the Court, without a re-examination of the questions involved, and upon the approval as to form by the attorneys for both parties.

See Decision, pages 221–226.

This confirmation, if it may be so called, by the Court, however it is submitted, was not sufficient to open any question for review by this Court.

As said by the Circuit Court of Appeals:

> "Great embarrassment results to the de-
> "feated party where a Referee appointed by
> "consent, in conformity to the State Code
> "of Procedure, has made his Report, and
> "the Court has entered judgment thereon;
> "*nor has the existing difficulty been substan-*
> "*tially overcome by the rule adopted by the*
> "*three federal districts of this State pro-*
> "*viding for motion for a new trial.*
>
> "In view of the decisions, it is rather sur-
> "prising that parties to common law actions
> "in the Circuit Court consent to such refer-
> "ences."
>
> Parker *v.* Ogdensburgh and L. C. R. Co., 79 Fed. Rep., 818–819.

Has, then, the defendant overcome the difficulty in this case and is its procedure sufficient to open for review any question whatsoever on this appeal?

Second.—THE TRIAL OF THIS ACTION WAS NOT HAD BEFORE A JURY, NOR BY THE COURT WITHOUT A JURY, IN ACCORDANCE WITH SECTIONS 649 AND 700 OF THE REVISED STATUTES.

1st. By Section 649 of the Revised Statutes it is provided:

> "Issues of fact in civil cases in any Circuit
> "Court may be tried and determined by the
> "Court without the intervention of a jury
> "whenever the parties or their attorneys of
> "record file with the clerk a stipulation in

" writing waiving a jury trial. The finding
" of the Court upon the facts, which may be
" either general or special, shall have the
" same effect as the verdict of a jury."

And by Section 700 it is provided:

" When an issue of fact in any civil
" cause in a Circuit Court is tried and
" determined by the Court without the
" intervention of a jury, according to Sec-
" tion 649, the rulings of the Court in the
" progress of the trial of the cause, if ex-
" cepted to at the time, and duly presented
" by a bill of exceptions may be reviewed by
" the Supreme Court upon a writ of error or
" upon appeal, and when the finding is
" special the review may extend to the deter-
" mination of the sufficiency of the facts
" found to support the judgment."

See Revised Statutes, Section 700.

The jurisdiction of the Circuit Court of Appeals to review a judgment entered in a case tried in a Federal Court otherwise than according to the strict course of the common law, is limited to cases tried in accordance with the sections above quoted.

Merrill *vs.* Floyd, 53 Fed. Rep., 172.

2d. THE CASE AT BAR WAS TRIED BY A REFEREE ACTING AS A COMMON LAW ARBITRATOR.

To quote Mr. Justice GRAY:

" Before the passage of this statute it had
" been settled by repeated decisions that in
" any action at law in which the parties
" waived the trial by jury, and submitted
" the facts to the determination of the Cir-
" cuit Court upon the evidence, its judgment

" was valid, but that this Court had no
" authority to revise its opinion upon the ad-
" mission or rejection of testimony, or upon
" any other question of law growing out of
" the evidence, and therefore when no other
" error appeared on the record, must affirm
" the judgment."

Bond *v.* Dustin, 112 U. S., 604.

The reasons for this were given by Chief Justice Taney in Campbell *vs.* Boyreau, 21 How., 223.

In that case, which was an action of ejectment, the parties agreed to waive a trial of the facts by jury, and that the facts as well as the law should be decided by the Court upon the evidence adduced by the parties.

Evidence was offered on both sides, and the Court proceeded to decide the facts in dispute and the questions of law arising upon the facts so found, and gave judgment against the plaintiffs in error, who were defendants in the Court below.

The Chief Justice said:

"It appears by the transcript that several
" exceptions to the opinion of the Court were
" taken at the trial by the plaintiffs in error—
" some to the admissibility of evidence, and
" others to the construction and legal effect
" which the Court gave to certain instru-
" ments of writing. But it is unnecessary to
" state them particularly, for it has been re-
" peatedly decided by this Court, that, in the
" mode of proceeding which the parties have
" seen proper to adopt, none of the questions,
" whether of fact or of law, decided by the
" Court below, can be re-examined and re-
" vised in this Court upon a writ of error. * * *
" Indeed, under the acts of Congress estab-
" lishing and organizing the Courts of the

" United States, it is clear that the decision " could not be otherwise; for, so far as ques- " tions of law are concerned, they are regu- " lated in their modes of proceeding accord- " ing to the rules and principles of the com- " mon law, with the single exception of the " Courts in the State of Louisiana, of which " we shall presently speak. And by the " established and familiar rules and prin- " ciples which govern common law proceed- " ings, no question of law can be reviewed " and re-examined in an Appellate Court " upon writ of error (except only where it " arises upon the process, pleadings or judg- " ment in the cause), unless the facts are " found by a jury, by a general or special " verdict, or are admitted by the parties, " upon a case stated in the nature of a special " verdict stating the facts, and referring the " questions of law to the Court.

" The finding of issues in fact by the Court " upon the evidence is altogether unknown " to a common-law Court, and cannot be " recognized as a judicial act. Such ques- " tions are exclusively within the province " of the jury; and if, by agreement of par- " ties, the questions of fact in dispute are " submitted for decision to the Judge upon " the evidence, he does not exercise judicial " authority in deciding, but acts rather in " the character of an arbitrator. And this " Court, therefore, cannot regard the facts " so found as judicially determined in the " Court below, nor examine the questions of " law, as if those facts had been conclusively " determined by a jury or settled by the ad- " mission of the parties. Nor can any ex- " ception be taken to an opinion of the Court " upon the admission or rejection of testi-

" mony, or upon any other question of law
" which may grow out of the evidence, unless
" a jury was actually impaneled, and the ex-
" ception reserved while they were still at
" the bar. The statute which gives the ex-
" ception in a trial at common law gives it
" only in such cases. And as this Court can-
" not regard the facts found by the Judge as
" having been judicially determined in the
" Court below, there are no facts before us
" upon which questions of law may legally
" and judicially have arisen in the inferior
" Court, and no questions, therefore, open to
" our revision as an appellate tribunal. Con-
" sequently, as the Circuit Court had juris-
" diction of the subject matter and the par-
" ties, and there is no question of law or fact
" open to our re-examination, its judgment
" must be presumed to be right, and on that
" ground only affirmed."

Campbell *v.* Boyreau, 18 How., 135.
Kelsey *v.* Forsyth, 21 How., 85.

In the absence, then, of a trial by the Court without a jury, as provided in Section 649 of the Revised Statutes, AS THE FACTS FOUND BY A REFEREE CANNOT BE TAKEN INTO CONSIDERATION BY THE APPELLATE COURT, THERE IS NOTHING UPON WHICH THEY CAN MAKE A REVIEW AS TO WHETHER OR NOT THE JUDGMENT RENDERED BY HIM IS IN ACCORDANCE WITH LAW.

In other words, the Appellate Court is precluded from making any examination whatsoever, of the record and no question is open to it for review, either upon the facts or upon the law.

That the statute, Section 649, in no way changed the rule of law stated in the decision before the passage of the statute, has been expressly held by this Court.

Mr. Justice Miller, writing the opinion for the Court, said:

> "The Judiciary Act of 1789, Section 12, "declares that the trial of issues in fact in "the Circuit Courts shall in all suits, except "those of equity and of admiralty and maritime jurisdiction, be by jury. * * * Numerous decisions, however, had settled that "this right to a jury trial might be waived "by the parties, and that the judgment of "the Court in such cases should be valid. "* * * But as was shown in the recent "case of Flanders *v.* Tweed, 9 Wallace, 425, "this Court had held that no review of the "decision of the Court below could be had "of any ruling at the trial where the parties "had consented to accept the Court instead "of a jury to decide issues of fact."

The learned Justice then refers to the passage of the Act of 1865, and continues:

> "The question arises on this statute "whether the mode of submitting a "case to the Court without a jury "was intended to be exclusive of all "other modes, so that if there is no "stipulation in writing, waiving a jury, there "is error for which the judgment must be "reversed. Although the language of the "Section might admit of that construction, "it is not the only one of which it is susceptible. As said in the case already referred "to of Flanders *vs.* Tweed, the main purpose "of the act undoubtedly was to enable the "parties who were willing to waive a jury "to have the case reviewed on writ of error "when tried by the Court alone. This was "rendered necessary, as shown by Mr. Justice Nelson in the opinion in that case, by

" the former decisions based on the idea that
" in such cases, the Court did not sit as a
" Court of law, but as *quasi* arbitrators. To
" remove this difficulty, the statute provided
" a mode by which the parties who agree to
" waive a jury should have the benefit of a
" writ of error to the rulings of the Court on
" questions of law. * * * We cannot be-
" lieve that Congress intended to say that
" the parties shall not, as heretofore, sub-
" mit their cases to the Court unless they do
" so by a written stipulation, but that it was
" the intention to enact that, if parties who
" consent to waive a jury desire to secure the
" right to a review in the Supreme Court of
" any question of law arising in the trial,
" they must first file their written stipula-
" tion, and must then ask the Court to make
" a finding of such facts as they deem essen-
" tial to the review, and ask the ruling of the
" Court on points to which they wish to ex-
" cept. If this is not done, the parties con-
" senting to waive a jury stand as they did
" before the statute concluded by the judg-
" ment of the Court on all matters submitted
" to it."

Kearney *vs.* Case, 79 U. S., 275.

BY THIS DECISION, THEREFORE, IT MUST BE HELD THAT THERE STILL EXISTS THE RIGHT TO SUBMIT A CASE TO THE DECISION OF THE COURT OR A REFEREE ACTING AS ARBITRATORS, AND THAT THE DECISION RENDERED, WHILE IT IS BINDING UPON THE PARTIES, IS NOT SUCH A DECISION AS CAN BE REVIEWED ON APPEAL.

Third.—THE JUDGMENT RENDERED IN THE CASE AT BAR IS IN THE NATURE OF A COMMON LAW ARBITRATION.

The consent by which the action was referred provides that all the issues be referred to Honorable George Hoadly "AS SOLE REFEREE TO HEAR AND DETERMINE THE SAME." This was a complete submission of the entire case both upon the facts and the law to his decision.

It was in no sense a trial by the Court without the intervention of a jury, as provided by Section 649, because it was a trial by a Referee, and, under the decisions above quoted, this Court cannot regard the facts found by him as judicially determined in the Court below. Nor can it examine any questions of law, BECAUSE THERE ARE NO FACTS BEFORE IT UPON WHICH QUESTIONS OF LAW MAY LEGALLY AND JUDICIALLY HAVE ARISEN IN THE INFERIOR COURT, and, therefore, open to revision by this Court as an appellate tribunal.

Fourth.—NOR DID THE SO-CALLED CONFIRMATION OF THE REPORT BY JUDGE BROWN AND THE ADOPTION BY HIM OF THE FINDINGS OF THE REFEREE AS THE FINDINGS OF THE COURT, BRING THIS CASE WITHIN THE PROVISIONS OF SECTION 649 FOR TWO REASONS:

1st. Because there has been no trial by the Court of the issues in this action, but simply an adoption of the findings of the Referee entered by consent of the parties and without a re-examination or retrial before the Court.

2d. Because there was no written stipulation filed with the clerk waiving a jury and consenting to a trial by the Court.

(A). The consent referring this case provided in accordance with the rule in the Southern District of New York that after decision by the Referee, no judgment should be entered "until after ten

days' notice of the filing of the report of the Referee and of the judgment proposed to be entered thereon shall have been given to the opposite party."

See Stipulation, page 46.

After the rendering of the Referee's Report, and prior to the entry of the judgment, the defendant made application to the Court for a new trial and an arrest of the judgment, as provided by the rule. Judge Brown, *upon consent of the parties*, signed a decision which appears at page 221 of the record. It was simply a formal decision overruling the motion on behalf of the defendant for a new trial and for an arrest of the judgment and adopting the findings of the Referee, both as to the facts and as to the law, as the findings and conclusions of the Court.

This certainly was not a trial before the Court without a jury, as contemplated or intended by Section 649 of the Revised Statutes.

(B). Even if it be considered such a trial, then there was no consent in writing filed with the clerk waiving a jury and to a trial by the Court without the intervention of a jury, as required by that section.

The only consent in writing was the consent referring the action TO THE REFEREE TO HEAR, TRY AND DETERMINE ALL THE ISSUES THEREIN.

In the decision signed by Judge Brown, the defendant attempted to conform to the provisions of Section 649 by inserting a statement to the following effect:

> "This cause coming on for trial and to be
> "held at a regular term of the Circuit Court
> "of the United States for the Southern Dis-
> "trict of New York, held at the United

"States Court House, in the city of New
"York, before the Hon. Addison Brown,
"District Judge, without a jury, and a trial
"by jury having been expressly waived by
"written consent of the parties duly filed
"with clerk of the Court, BY WHICH
"CONSENT ALSO IT WAS PROVIDED AND AGREED
"THAT THE HON. WILLIAM G. CHOATE
"SHOULD BE APPOINTED REFEREE TO HEAR
"AND DETERMINE THE SAID ACTION AND THE
"ISSUES THEREIN."

See Decision, page 221, folio 662.

While the decision recites that a jury trial was waived in accordance with Section 649, the very statement itself shows that that consent was the one referring the case to Hon. William G. Choate as Referee.

If, then, a trial by Referee is not considered a trial before the Court without a jury, certainly a consent referring an action to a Referee cannot be considered as the written stipulation required by Section 649 of the Revised Statutes consenting to a trial "*by the Court* without the intervention of a "jury whenever the parties or their attorneys of "record file with the clerk a stipulation in writing "waiving a jury."

In other words, a trial before a Referee cannot be deemed a trial by the Court, hence a consent referring the whole issues to a Referee cannot be considered as a consent to a trial by the Court.

But the proceeding had before Judge Brown, if in any sense it could be considered *a trial by the Court without a jury*, WAS WITHOUT ANY CONSENT OR STIPULATION AT ALL. The decision itself shows that the only consent given was the consent to refer the issues to the Referee.

It, therefore, follows:

1st. THAT IF THE JUDGMENT RENDERED IN THIS ACTION WAS NOT IN ACCORDANCE WITH THE PROVISIONS OF SECTION 649, IT WAS IN THE NATURE OF A COMMON LAW ARBITRATION AND UNDER THE DECISIONS OF THIS COURT NO QUESTION IS OPEN FOR REVIEW.

2d. THAT IF THE PROCEEDINGS HAD BEFORE JUDGE BROWN WERE EQUIVALENT TO A TRIAL BEFORE THE COURT, WITHOUT A JURY, THEN THERE WAS NO STIPULATION CONSENTING TO SUCH A TRIAL FILED WITH THE CLERK IN WRITING WAIVING A JURY UNDER THE PROVISIONS OF SECTION 649.

In either aspect of the case, there is no question open for review by this Court, and the parties "stand as they did before the Statute concluded by "the judgment of the Court on all matter submit-"ted to it."

Kearny *v.* Case (*supra*).

POINT II.

Even if the judgment rendered be considered in any sense a judgment upon a trial by the Court, the only question which by any possibility can be presented for review, is whether the facts found by the Referee support the judgment rendered.

THE WHOLE ISSUE IN THIS CASE, BOTH UPON THE LAW AND THE FACTS, WAS REFERRED TO THE REFEREE TO HEAR AND DETERMINE.

The proceedings before Judge Brown, as claimed under Point I, was simply a motion for a new

trial, under the rule in the Southern District of New York, and was in no sense a trial by the Court.

But, if that proceeding be considered such a trial, then this case is within that class of cases where the parties consent to a trial by the Court without filing a stipulation under Section 649; or where the Court refers the case to a Master or Referee to hear and report the evidence, and upon the coming in of the report adopts the findings of the Master or Referee as the findings of the Court and renders judgment accordingly; or where the consent is to a referee to hear and report to the Court; or where a partial reference may have been ordered.

In such cases it has been decided over and over again that the only questions before the appellate court are whether the facts found by the Referee sustain the judgment.

The appellate court cannot review exceptions to the admission or exclusion of evidence or to findings of fact by the Referee or to his refusal to find fact as requested.

Shipman *v.* Straitsville Central Mining Co., 158 U. S., 356.
Roberts *v.* Benjamin, 124 U. S., 64.
Boogher *v.* N. Y. Life Ins. Co., 103 U. S., 90.
Bond *v.* Dustin, 112 U. S., 604.
Paine *v.* Central Vermont R. R. Co., 118 U. S., 152.
Andes *v.* Slauson, 130 U. S., 435.

To the same effect are the decisions of the Circuit Court of Appeals in the various Circuits.

Shipman *v.* Ohio Coal Exchange, 70 Fed. Rep., 652.
Board of Commissioners *v.* Sherwood, 64 Fed. Rep., 103.
Abraham *v.* Levy, 72 Fed. Rep., 124.

Merrill *v.* Floyd, 53 Fed. Rep., 172.
Wesson *v.* Saline County, 73 Fed. Rep., 917.

In Shipman *v.* Straitsville Mining Company, this Court, speaking by Mr. Justice Brown, said:

> "This case was referred by consent to Mr. "Harrison, a so-called Master Commissioner, " as Referee, with instructions to report the " testimony with the findings of fact and of " law to the Court. The fact that no such " officer as 'Master Commissioner' is known " to the law does not impair the validity of " the reference, as it is perfectly competent " for the Court to refer a case to a private " person (Hecker *v.* Fowler, 69 U. S., 2 Wall. " 123). And as the Court in its judgment " ordered his findings to stand as the find- " ings of the Court, the only questions be- " fore this Court are whether the facts found " by the Referee sustained the judgment. " As the case was not tried before the Cir- " cuit Court upon a waiver in writing of a " trial by jury, this Court cannot review ex- " ceptions to the admission or exclusion of " evidence or to findings of fact by the " Referee, or to his refusal to find facts as " requested."

Shipman *v.* Straitsville Central Mining Co., 158 U. S., 356-361.

The only question, then, which by any possibility is open to this Court for review is whether the facts found by the Referee support the judgment rendered.

Point III.

The judgment rendered is fully supported by the facts found by the Referee.

Of the seventy seven assignments of error filed by the defendant in this case, it is submitted, only one, to wit, the Seventh, raises any question for examination by this Court.

The Seventh assignment of error is as follows:

> "That the said Circuit Court erred in "holding and deciding, upon the hearing "and trial of this action as aforesaid, that "the findings of fact made by the said Ref- "eree, as contained in his said report made "and filed in this action on the 18th day of "February, 1898, authorized said judgment "for the plaintiff."

See Assignments of Error, page 479.

This is the only assignment of error which raises any question as to a ruling and decision upon a matter of law *after the award of the Referee.*

First.—THE FINDINGS OF FACT BY THE REFEREE FULLY SUPPORT THE JUDGMENT RECOVERED BY THE PLAINITFF UPON THE FIRST CAUSE OF ACTION.

The balance claimed by the plaintiff to be due him from the defendant, amounted to $71,057.63.

It was reached in the following manner:

Amount earned under the contract, as shown by the engineer's certificate	$3,895,798 79
Amount credited by the defendant to the plaintiff for materials furnished	$34,598 90
Total	$3,930,397 69

From this there was deducted the following:		
Amount of payments.	$3,626,865 20	
Less nut locks charged.	$9,558 63	
Amount paid for dead brakeman.	1,999 00	11,557 63
Balance...		$3,615,307 57
Transportation		50,000 00
Final payment		173,532 49
Balance properly expended out of $40,000 retained		20,500 00 $3,859,340 06
Balance		$71,057 63

These amounts agree with the engineer's certificate and with the figures contained in the final receipt.

That balance was claimed by the plaintiff under a full compliance by him with the terms of the contract.

The defendant did not deny that that balance had been earned, but sought to avoid its payment by setting up various affirmative defenses, hereafter to be considered, under which it claimed the right to charge the plaintiff with the following items:

A penalty for not completing the contract on June 1st	$40,000 00
For patented nut locks furnished by the defendant to the plaintiff and charged to him	$9,558 63
Settlement of judgment of King &	

Wetherill against plaintiff's wish and without his consent.....	19,500 00
Paying damages for killing brakeman.	1,999 00
Total.....	$71,057 63

Of this balance of $71,057,63 claimed by the plaintiff, the Referee has allowed two items only:

1st. The amount deducted by the defendant, as liquidated damages, for non-completion of the contract on June 1st, 1888 .....$40,000 00

2d. The amount deducted by the defendant for patented nut locks furnished by the defendant to the plaintiff and charged to him 9,558 63

It will be only necessary then to consider the findings of fact by the Referee in reference to these two items.

(A). *As to the right of the defendant to deduct the $40,000 penalty, the Referee found the following facts:*

2

"That immediately after the execution of the "said contract, the plaintiff preceeded to carry out "and perform the same, and did carry out and per- "form the same, except a portion thereof, other- "wise agreed between the parties, and substantially "completed the same on or about the first day of "November, 1887, and the same was duly ac- "cepted by the defendant on or about the first day "of March, 1888."

5.

"That the consideration for the performance of "said contract originally mentioned in said con-

" tract was $3,914,600, but before the execution of " said contract by the plaintiff, by and with the " consent of the defendant, the consideration was " changed and made $3,954,600."

6.

" That the plaintiff made and entered into a sup- " plemental contract whereby he agreed with the " defendant to complete his performance of said " contract on or before June 1st, 1887, and to allow " the said defendant by way of forfeiture in case " the said railway were not so completed by the 1st " of June, 1887, the sum of $40,000."

7.

" That the defendant failed to furnish the plaintiff " with rights of way as by said contract it had " agreed to do in time to enable the plaintiff to " complete his contract prior to the 1st day of June, " 1887, or prior to the 1st of August, 1887, but on " the contrary, delayed the plaintiff in the perform- " ance of said contract at a point upon the said " road known as Minneville, until October 27th, " 1887, by reason of the neglect, failure and " omission of the defendant to obtain the neces- " sary right of way at said point so as to permit " the construction of the road and completion of " the contract at said point."

8.

" That the plaintiff was thereby prevented from " completing his contract on or prior to August 1st, " 1887, and also on or prior to June 1st, 1887, by " the negligence, omission and fault of the defend- " ant."

See Findings, pp. 111–112.

Here, then, is a conclusive finding by the Referee that the defendant failed in its obligation to furnish rights of way to the plaintiff to enable him to complete his contract within the contract time.

UPON THE FACTS SO FOUND, THE LEARNED REFEREE HELD AS CONCLUSIONS OF LAW:

1st. "That the defendant is not entitled to charge "the plaintiff or to retain and deduct from the "amount earned and payable to the plaintiff under "the said contract, the sum of $40,000 as a for- "feiture or liquidated damages for not completing "the contract upon June 1st, 1887."

2d. "That under the facts proved in this case, "the plaintiff is not legally liable to the defendant "for any damages for failure to complete the con- "tract within the contract time or the time agreed "upon for the reason that the plaintiff was pre- "vented by the negligence of the defendant and "its omission to procure the necessary right of "way completing the work in such time."

See Findings, pp. 117–118.

(B). *That the conclusions reached by the Referee are fully supported by the facts found by him is conclusively settled by the authorities.*

It is a well-settled rule that where one party demands strict performance as to time by another party he must perform on his part all the conditions which are requisite in order to enable the other party to perform his part, and a failure on the part of the party demanding performance to do the preliminary work required, in order to enable the other party to complete his within the time limited,

operates as a waiver of the time provision in the contract.

Dannat *v.* Fuller, 120 N. Y., 558.
Stewart *v.* Keteltas, 36 N. Y., 388.
Grube *v.* Schultheiss, 57 *id.*, 669.
Gallagher *v.* Nichols, 60 *id.*, 438.
Weeks *v.* Little, 89 *id.*, 566.

It is also well settled that after the failure to perform a condition precedent not only is the time limit in the contract broken, but that thereafter the other party has a reasonable time to perform.

In other words, after the failure to procure the rights of way either before June 1st or August 1st, the time limit was broken and the plaintiff had, for the performance of his contract, such reasonable time as might be proved to be necessary for the completion of his work.

In the present case there was no proof of what a reasonable time for completion would have been.

It should be sufficient for the Court to know that the entire work was substantially completed within a few days after the procuring of the last right of way.

This doctrine is well settled in our Courts.

"The time specified in the contract for performance had been abrogated and the obligation as to time no longer bound either party. Thereafter each party had a reasonable time in which to perform." Opinion, RAPALLO, J.

Lawson *v.* Hogan, 93 N. Y., 44.
Dady *v.* The Mayor, 57 Hun, 559.
Willis *v.* Webster, 1 App. Div., 301.

These cases were decided upon the authority of earlier authorities to the same point.

They are based substantially upon the doctrine that the extension of time in days covering periods

during the different seasons when the days are either short or long, clear or rainy, cannot be properly apportioned by the Court as between the parties.

This precise point was raised in a case in the New York Court of Appeals and was decided contrary to the defendant's contention

The Court says:

> "The contractor could gain nothing by "haste and pressure in one direction so long "as entire completion was delayed by his "employers. We cannot divide and appor- "tion the fault. It is enough that damages "were payable upon a failure of entire com- "pletion, and that was rendered impossible "by the defendant's acts; and her executor "cannot recover for a failure which she "made inevitable. But for that we cannot "say that there would have been any delay "beyond the contract time."

Weeks *v.* Little, 89 N. Y., 570.
Willis *v.* Webster, 1 App. Div., 301.

The conclusion, then, of the learned Referee that the defendant was not entitled to deduct the $40,000 forfeiture for non-completion by the first day of June, 1888, is fully supported by the facts found by him as to the non-performance of its obligations by the defendant and its waiver thereby of the time limit in the contract.

Second.—THE FINDINGS OF THE REFEREE FULLY SUPPORT HIS CONCLUSION THAT THE DEFENDANT WAS NOT ENTITLED TO CHARGE THE PLAINTIFF WITH THE SUM OF $9,558.63, THE AMOUNT PAID BY THE DEFENDANT FOR PATENTED NUT LOCKS WHICH WERE FURNISHED BY IT DURING THE PERFORMANCE OF THE WORK.

This amount is included in the sum of $3,626,-865.20 stated in the receipt as the amount of payment made by the defendant to the plaintiff under the following heading:

> "And whereas the said Chicago, Milwaukee and St. Paul Railway Company has paid the said Clark to apply on said contract in money, material, labor and transportation, the sum of $3,626,865.20."

See Receipt, page 114, folio 341.

The item for nut locks, although not specifically designated, is contained in that amount.

See Referee's Findings, p. 113, fol. 339.

There was no question in the case upon the following points:

1st. That the nut locks were furnished and paid for by the defendant.

2d. That they were used in the construction of the road.

The only point was as to which of the parties is properly chargeable for them.

(A). *As to the items for nut locks, the Referee found the following facts:*

9.

"That during the progress of the work the de-
" fendant purchased and furnished to the plaintiff
" and charged him for patented nut locks for which
" the defendant paid $9,558.63."

10.

"That the said nut locks so furnished by the de-
" fendant were used by the plaintiff in the construc-
" tion of the road."

11.

"That there are no provisions in the contract "which require that the plaintiff, and the plaintiff "never agreed that he should use in the construc- "tion of the road under said contract any patented "nut locks.

"That the plaintiff was ordered by the defend- "ant to put such nut locks on the road at the be- "ginning of the work. That he protested against "their use, and finally yielded and used them in "track laying upon the promise that the matter of "the charge for said nut locks should be adjusted "after the completion of the contract."

See Referee's Finding, pages 112, 113.

UPON THE FACTS SO FOUND, the REFEREE FOUND AS CONCLUSIONS OF LAW:

3.

"That the plaintiff is not liable to the defendant "for the sum of $9,558.63, the cost of patented "nut locks furnished by the plaintiff to the defend- "ant and used by him in the performance of the "said contract."

4.

"That there was no obligation imposed by the "contract upon the plaintiff to furnish and pay for "patented nut locks to be used in the construction "of said road."

5.

"That the plaintiff is not legally indebted to the "defendant in any sum whatever for patented nut- "locks furnished by the defendant, and used in the "construction of the railroad under said contract."

See Conclusion of Law, page 118.

(B). *The conclusions of the learned Referee are fully supported by the facts found by him, as there was no obligation upon the plaintiff to furnish patented nut-locks, and they were furnished by the defendant without the request of the plaintiff, and used by him in the construction of the road solely upon its request so to do.*

1st. IF IT IS CLAIMED THAT THEY WERE REQUIRED TO BE FURNISHED UNDER THE CLAUSE OF THE CONTRACT REQUIRING THE WORK TO BE DONE IN A WORKMANLIKE MANNER, THEY CANNOT BE SO CHARGED.

The workmanlike manner under which this contract was to be performed, was that particularly specified and designated in the contract and specifications themselves.

Nut-locks were not mentioned in the specifications and contract. They are a patented and expensive article.

If it had been intended to obligate the plaintiff to furnish nut-locks, they should have been specified.

The explicit mention of all the other items of track material, forbids the including of nut-locks.

This makes applicable the legal maxim, "*Mentio unius exclusio alterius.*"

2d. IF THEY ARE INCLUDED IN THE CONTRACT, THEY MUST BE INCLUDED UNDER THE HEADING OR NOMENCLATURE OF SPLICES AND BOLTS OF THE J. T. CLARK PATTERN OR SPIKES AND TIES, STEEL RAILS, ANGLE-BARS AND BOLTS, TRACK BOLTS AND TRACK SPIKES, AND AS SUCH, MUST BE CHARGED FOR BY WEIGHT UNDER THE CONTRACT.

Those are the only track materials specified in the contract.

See Article 6, Section 1, p. 159.
" " 14, " 1, p. 172.
" " 16, " 6, p. 177.

Those were the only kind of track material specified in the contract, which could in any way cover the nut locks.

They were the only classes of track materials which the defendant was at liberty to purchase and charge to the plaintiff.

The defendant's witnesses, Delano, Moore and Moll, say that nut locks are part of the track bolt.

It will be observed that in each of the three articles of the contract above referred to, track bolts are specified.

Upon either of these theories, the defendant would only have the right to charge the plaintiff at the rates specified in the contract and not at the exorbitant rate sought to be charged.

The contract fixes the sums to be paid as follows:

> Angle bars, 1.65/100 cents per pound.
> Track bolts, 2.60/100 cents per pound.
>
> See Contract, Article 6, Section 1, p. 160, fol. 478.

In other words, the contractor was to be charged by weight for those articles instead of by price paid.

A correct calculation of all the nut locks used upon the main line of this railroad shows the following facts:

352 joints were used for each mile of road; there were six nut locks on each joint or 2,112 nut locks to a mile. The entire number of nut locks for 202.8 would be 428,313 nut locks.

From actual weight of locks used, 15½ to 16 nut locks made a pound.

If the defendant's contention as to the interpretation of the contract is correct as to the weight of the nut locks, the plaintiff could be charged only

for them by weight and as angle bars or splices at the following rates:

As a part of the angle bars and at angle bar price, 27,108 pounds of nut locks at .0165 per pound, $441.11.

Or as part of track bolts at track bolt price, 27,108 at .026, $704.80.

Testimony of Hegeman, pp. 407-408.

The plaintiff claims that the patent nut locks could not be required in any case under the terms of the contract, but that if they could be required, the defendant could only charge for them under the two theories above mentioned the sum of $447.28 or $704.80, instead of the sum of $9,558.63.

Third.—THE RECOVERY BY THE PLAINTIFF OF THE SUM OF $2,425, THE VALUE OF TIMBER BELONGING TO HIM CONVERTED BY THE DEFENDANT IS ALSO FULLY SUPPORTED BY THE FACTS FOUND BY THE REFEREE.

(A). *The facts found by the Referee are as follows:*

19.

"That in or about the months of March and "April, 1888, the plaintiff was the owner of 97,000 "feet B. M. bridge timber then in the yard of "the defendant at Chillicothe and on the line of "the railroad."

20.

"That the said lumber did not conform to the "standard of the defendant and was not purchased "by the defendant from the plaintiff or allowed in "the final certificate of the chief engineer under "the contract in this action to the plaintiff."

21.

"That in and about the month of June, 1888, "the defendant took possession of the said lumber "and converted the same to their own use without "assent or knowledge of the plaintiff."

22.

"That the value of the said lumber at the time "of the taking in June, 1888, was $2,425."

See Referee's Findings, page 117.

Upon the facts so found, the Referee held as a conclusion of law.

6.

"That the plaintiff is entitled to recover from "the defendant the sum of $2,425, with interest "from June 1st, 1888, for the conversion by the "defendant of lumber belonging to the plaintiff."

See Referee's Findings, page 118, folio 354.

(B). *There is no merit in the technical defenses set up by the defendant to the recovery of that item.*

1st. It was not covered in the engineer's final estimate, for the reason that the estimate antedated the conversion of the material.

2d. It was not at all affected by the provisions of the contract in regard to the final estimate, for the reason that it is a claim entirely outside of the contract and not arising under it.

3d. No question as to joinder of actions of tort and contract can be raised.

As it appears upon the face of the complaint, it must be raised by demurrer and is waived because not so raised.

See N. Y. Code, Sec. 499.

The questions above considered, it is submitted, are the only ones which are open, in any event, for review by this Court, and as to those questions, it is also submitted, there is no error of law in the judgment upon the facts found by the Referee.

Point IV.

The receipt offered in evidence by the plaintiff in error is not a bar to the recovery by the defendant in error for the two items allowed by the Referee under the first cause of action.

First.—THE FACTS FOUND BY THE REFEREE IN RELATION TO THE RECEIPT, ARE AS FOLLOWS:

13.

"That upon the 9th day of March, 1888, the "plaintiff signed and caused to be delivered to a "representative of the defendant a paper writing "or receipt presented to him by the defendant "for signature, of which the following is a copy; "and upon the signature thereof by said Clark, "and its delivery by him to the defendant, the "plaintiff was paid by the said defendant, the said "sum named therein of $232,532.40, less the sum "of $40,000 claimed in said paper to be retained "for forfeiture in not completing performance of

" his work under said contract on or prior to June " 1st, 1887, and the sum of $3,626,865.30 included " therein, embraces said sum of $9,558.63 claimed " by defendant to be due for nut locks. Said " $40,000 so deducted and the actual amounts so " paid, was $173,532.49."

(Here follows a copy of the receipt):

14.

" That said receipt and paper contained an ac- " curate, truthful and *undisputed* account of all " dealings between said parties, *except in the mat- " ter of the $40,000 deducted for time forfeiture. The " $9,558,63 for nut locks embraced in the $3,626,865.- " 30 and the lumber hereinafter referred to and " herein valued at $2,425.* Besides the above, the " defendant has paid the $40,000 reserved as in- " demnity or security for the payment of claims " against Clark and in addition thereto upon like " accounts, the sum of $521.75."

15

" That at the time of the signing and delivery of " said last mentioned paper, the final certificate or " estimate of the chief engineer under the contract, " had not been delivered to the plaintiff or any of " his agents by the defendant or the said engineer " and the contents thereof were not known to the " plaintiff other than by reference thereto contained " in said receipt of March 9th, 1888."

16

" That no other final settlement of the accounts " under said contract had been had between the " plaintiff and the defendant at the time that the " said last-mentioned paper was signed and de- " livered."

17

"That at the time of the signing and delivery of "said last-mentioned paper the question of the "liability of the plaintiff for nut locks which had "been left by the parties to this action open for "settlement and adjustment until after the comple- "tion of the work under said contract and had been "referred by the defendant to the chief engineer "under said contract, had not been passed upon by "him; that the said chief engineer had referred the "question for opinion to the defendant's counsel, "but had not at said time given his opinion in re- "lation thereto."

18

"That no account was ever otherwise than by "said paper and a receipt of said money, stated of "the transactions under and connected with said "contract between the plaintiff and the defendant."

See Findings, pages 116–117.

UPON THE FACTS SO FOUND, THE LEARNED REFEREE FOUND AS CONCLUSIONS OF LAW.

7

"That the signing and delivery by the plaintiff "of the receipt on or about the 9th day of March, "1888, and the acceptance of the check of $173,- "532.49 under the facts and circumstances proved "in this case were as to the two sums of $9,558.63 "charged for nut locks and $40,000 charged by "way of forfeiture for non-performance in time "wholly without consideration and in violation of "the contract between the parties and do not con- "stitute any bar to the recovery of the plaintiff for "the sums of $9,558.63 and $40,000 otherwise as "due under the contract."

8.

"That the signing and delivery of said receipt, "and the acceptance of the check thereunder, do not "constitute a legal payment or accord and satisfac- "tion of the said sums of $9,558.63 and $40,000 or "either of them or any part or either of them."

9.

"That no account of the transactions under this "contract and of the claims sued on in this action "was ever had or stated between the parties to this "action otherwise than by said receipt or paper of "March 9th, 1888."

See Conclusions, pages 118–119.

By this receipt, the defendant sought to establish

1st. Payment.

2d. Accord and satisfaction.

3d. An account stated.

As to payment, the answer alleges:

"And the defendant alleges that it has "paid to or for the plaintiff, or on his ac- "count, under the said contract, in money, "material, labor and transportation, as au- "thorized and provided for in and by the "said contract, a sum in excess of any and "all amounts which became due or were "earned by the plaintiff under said contract, "or which had been certified to or allowed "by the Chief Engineer of the defendant "Railway Company, including all extra "work performed or material furnished by "the plaintiff under said contract, or in addi- "tion thereto."

See Amended Answer, page 24, fol. 71.

As to the account stated, the answer alleges:

After stating the making of the supplemental contract and of the final estimate and certificate of the engineer, it alleges:

> "And thereupon and on or about the 9th
> "day of March, 1888, an account was stated
> "and agreed to by and between the plaintiff
> "and the defendant Railway Company,
> "whereby the amount of the compensation
> "due to the said plaintiff Clark for all the
> "work done and material furnished by him
> "under the said contract of March 6th, 1886,
> "for the construction of the railroad of the
> "defendant from Ottumwa, Iowa, to the
> "Missouri River, including all extra work
> "performed and material furnished of every
> "kind and description, less deduction made
> "for work not done and work assumed by
> "the defendant Company, was agreed upon
> "and fixed and adjusted at the sum of
> "$3,895,798.79. * * * And that the
> "amount then due to said Clark on said con-
> "tract was the sum of $213,532.49."

See Amended Answer, 4th defense, pages 27-28, fols. 81-82.

As to accord and satisfaction, the answer alleges:

> "That thereupon, and on the said 9th day
> "of March, 1888, the said defendant Railway
> "Company duly paid to the said Heman
> "Clark the said sum of $173,532.49, and the
> "said plaintiff Clark thereupon acknowl-
> "edged in writing that he had received from
> "the said defendant Railway Company the
> "said sum of $173,532.49, in full satisfaction
> "of the amount due to him on said esti-
> "mates of said Chief Engineer of the defend-
> "ant Railway Company, and in full satis-

" faction of all claims and demands of every
" kind, name and nature arising from, or
" growing out of, said contract of March 6th,
" 1886, and of the construction of said rail-
" road, excepting the obligation of the said
" Railway Company to account for such sum
" of $40,000, as provided in and by the said
" receipt and acknowledgment of the said
" plaintiff Clark."

See Amended Answer, page 29, fol. 87.

This receipt, it will be noticed, has upon it no seal and cannot, therefore, be treated as a sealed instrument.

Upon it the defendant rested practically its entire defense.

When asked whether it was just and right that the plaintiff should be mulcted in the sum of $40,000 for not completing the road in time when the conceded testimony shows, and the Referee found, that the fault was that of the defendant, its only reply is the plaintiff has lost his right to payment by reason of the receipt.

When asked whether it was just and reasonable and whether there is any provision of the contract warranting it in taking from the plaintiff $9,558.23 for nut locks, its only answer is the receipt prevents the payment.

It was read, reread and read again at every stage of the trial, and it was claimed constantly by the defendant that no matter how just were the claims of the plaintiff, the receipt was a bar to them all.

It is claimed that the receipt stands as payment though no payment has been made ; that it stands for an account stated though no account has been rendered and no statement made ; that it stands for an accord and satisfaction without the slightest

proof of the accord. The defense is not a just one, and, it is submitted, is also not a legal one.

The receipt will now be considered in the three aspects relied upon by the defendant:

1st. ITS LEGAL EFFECT AS EVIDENCE OF PAYMENT.

2d. ITS LEGAL EFFECT AS AN ACCORD AND SATISFACTION.

3d. ITS LEGAL EFFECT AS AN ACCOUNT STATED.

Second.—**The legal effect of the receipt as payment.**

(A). *It is well settled that a receipt is simply prima facie evidence of payment.*

"Receipts form a well-established exception to "the rule that a written instrument cannot be "varied or contradicted by parol evidence. *One "may thus contradict his own receipt.* The ac- "knowledgment of mere payment in a receipt is "*prima facie* evidence only and may be rebutted "by parol evidence showing that the consideration "is different in kind or amount from that named, "or that notes or checks were taken in payment; "that it was paid only in part or not at all, or that "the consideration which did pass was illegal. In "most of the States this may be shown, though "the receipt may be in full of all demands or em- "bodied in the consideration clause of an instru- "ment under seal."

Am. Enc. of Law, Vol. 19, page 115.

There are some States in which it is held that where the receipt contains a seal, that it is not open to oral explanation.

In the present case there is no seal upon the receipt, and there is no claim that any seal was ever placed upon it.

The decisions of all the States agree that in such cases receipts are open to oral explanation.

It will be sufficient, in addition to this general statement of the rule, to cite cases showing that the same rule prevails in the Federal courts and in the courts of the State of New York.

Fire Ins. Co. *v.* Wickham, 141 U. S., 564.

Harris *v.* Davis, 44 Fed. Rep., 172.

Judge EARL, of the Court of Appeals, thus very clearly lays down the rule:

"The only question then for us to consider is whether the various receipts in full "were so far conclusive upon the plaintiff "that he could not show by parol that the "items for extra bonus paid by him to the "butchers were nevertheless his due.

"*It has long been settled in this State, that "a receipt furnishes mere prima facie evi- "dence of the facts stated therein, and that "it may be controverted or explained by "parol evidence. This grows out of the fact "that a receipt is not a contract. It is a "mere declaration or admission in writing.*

"* * *

"It has never been intimated, in any case "in this State, that it made any difference "whether the receipt was for a specified sum "of money, or in full. The same rule ap- "applies, and no reason is apparent why it "should not. A receipt for a specified sum "of money contains a declaration that so "much has been paid upon account, or for a

" particular purpose. A receipt in full con-
" tains a declaration that a certain sum has
" been paid in full of all claims of a certain
" kind, or of all demands. Neither kind of
" receipt embodies any contract. Both fur-
" nish only *prima facie* evidence, and are
" valuable only as such. Both are equally
" open to explanation or contradiction."

Ryan *v.* Ward, 48 N. Y., 207.
Miller *v.* Coates, 66 N. Y., 609.

(B). *The transactions culminating in the receipt show that the defendant has never actually paid the amount claimed by the plaintiff.*

It was conceded by both parties, and stated in the engineer's certificate, and in the receipt itself, that there had been earned by the plaintiff under the contract the sum of $3,895,798.79.

It was also not disputed, and likewise stated in the receipt, that the plaintiff should be credited for materials sold, and for rebates and other matters of that description the sum of $34,598.90, making a total of $3,930,397.69.

As to that amount being due, there was no dispute whatsoever.

We start then with the amount concededly due to the plaintiff.....		$3,930,397 69
The receipt states that there had been paid to the plaintiff to apply on the contract in money, material, labor and transportation, the sum of.....	$3,626,865 20	
In this amount the Referee found that		

the plaintiff's claim for nutlocks was included. (See Findings, page 166, folio 346.)		
There had then been paid in money, material, etc., less the claim for nutlocks, the sum of.....	3,617,306 57	
Claim for nutlocks.	9,558 63	$3,626,865 20
Leaving a balance of.....		$303,532 49
Out of this balance the defendant sought to offset two items, which were undisputed as to amount.		
The items are the amount charged for transportation.....	$50,000	
Amount deducted by way of forfeiture for non-completion..	40,000	90,000 00
Leaving a balance of.....		$213,532 49
As against this balance the defendant retained under the contract, and it was not disputed that it had the right so to do, as security for liens and claims.....		40,000 00
Leaving a balance of.....		$173,532 49

It was this balance that was paid by the check and for which the receipt was given.

The following statement will show more clearly the transactions as shown in the receipt:

SUMMARY.

Earned under contract fixed by engineer		$3,895,798 79
Amount fixed for materials, rebates and other matters of that description		34,598 90
Total		$3.930,397 69

PAYMENTS AND CREDITS.

Transportation fixed by contract.	$ 50,000	
Amount retained as security for liens, etc	40,000	
Payments in money, etc	3,617,306 57	3,707,306 57
Balance		$223,091 12
Deducted for nutlocks	$9,558 63	
Deducted for overtime penalty	40,000 00	49,558 63
Balance		$173,532 49

At the time of the receipt by the plaintiff of the $173,532.49 there was no dispute, and could be none, between the parties but that at least that sum was due, as it was the difference between the amount due the plaintiff, after deducting all offsets claimed by the defendant *in accordance with its contention.*

IN OTHER WORDS, BY THAT PAYMENT THE PLAINTIFF GOT SIMPLY THE AMOUNT WHICH, IN ANY EVENT, HE WAS LEGALLY ENTITLED TO AND AS TO WHICH AMOUNT THE DEFENDANT HAD NO DEFENSE TO ITS PAYMENT.

Unless, then, the defendant can show that the difference between the amount due to the plaintiff, to wit, $3,930.397.69, and the amount of the payment for which the receipt was given, $173,532.49, has been paid or released, the acceptance by the plaintiff of the sum of $173,532.49 in full payment would be no bar to his recovery for the difference, under the rule that payment by a debtor of a part of his debt is not a satisfaction of the whole.

United States *v.* Bostwick, 94 U. S., 53.
Fire Ins. Co. *v.* Wickham, 141 U. S., 564.
Ryan *v.* Ward, 48 N. Y., 204.
Gray *v.* Barton, 55 N. Y., 68.
Perkins *v.* Lockwood, 100 Mass., 249.
Curran *v.* Rummell, 118 Mass., 483.
McKay *v.* Myers, 168 Mass., 312.
Hodges *v.* Truax (Ind.), 49 N. E. Rep., 1079.
Myers *v.* Green (Ind.), 51 N. E. Rep., 942.
Fletcher *v.* Wurgler, 97 Ind., 223.
Marion *v.* Heimbach (Minn.), 64 N. W. Rep., 386.
McIntosh *v.* Johnson (Neb.), 70 N. W. Rep., 522.
Cincinnati *v.* Cincinnati Railroad Co., 6 Ohio N. P., 140.
See also Fitch *v.* Sutton, 5 East's Rep., 230.

That the receipt in full of itself would in no way bar recovery by the plaintiff if its effect was to discharge an amount concededly due by the payment of a part, was expressly decided by this Court in FIRE INS. ASSN. *v.* WICKHAM (*supra*).

In that case, speaking of the effect of a receipt in full, Mr. Justice Brown said:

"It was not seriously contended in this "case that the defendant was not legally "liable upon its policies for the expenses "clearly incidental to the fire, of raising and "saving the vessel as well as for the direct "injury to the vessel in consequence of the "fire, and if the plaintiffs were induced to "settle their claims for one-half the amount "that was due them, and there was no con- "sideration for the relinquishment of the "other half, this suit will lie for the recovery "of the amount. The rule is well established, "that where the facts show clearly a certain "sum to be due from one person to another, "a release of the entire sum upon payment "of a part is without consideration, and the "creditor may still sue and recover the "residue.

"If there be a *bona fide* dispute as to the "amount due, such dispute may be the sub- "ject of a compromise and payment of a "certain sum as a satisfaction of the entire "claim, but where the larger sum is ad- "mitted to be due, or the circumstances of the "case show that there was no good reason to "doubt that it was due, the release of the "whole upon payment of part will not be "considered as a compromise, but will be "treated as without consideration and void."

Fire Ins. Assn. *v.* Wickham, 141 U. S., 564.

Unless, then, there was a release by the plaintiff of the balance of his claim upon some new consideration, the receipt in full is no bar to his recovery.

Third.—**The legal effect of the receipt as an accord and satisfaction.**

To make the rule that payment of a part of a debt concededly due is no bar to the recovery of the balance inapplicable to this case, either one of two things must appear.

(*a*). *That the amount due the plaintiff was an unliquidated demand, or*

(*b*). *That there was a bona fide dispute between the parties as to the amount due, which was settled upon a sufficient consideration.*

Neither one of these two conditions exists in the case at bar.

1st. THE AMOUNT DUE THE PLAINTIFF WAS A WHOLLY LIQUIDATED DEMAND.

(*a*). The contract, Article 15, Sec. 1, provides as follows:

> "The party of the first part further agrees "to pay to the said second party, in the man- "ner and at the time and times hereinafter "set forth, the sum of $3,954,600; which "said sum shall be in full settlement, pay- "ment and satisfaction, of all and every "claim and demand of said second "party upon or against the said first party "for building, constructing and fully com- "pleting, in strict conformity to the stipula- "tions, specifications and requirements, "hereinabove mentioned and referred to, the "said railroad, in this agreement proposed "and agreed to be built, and the said pay- "ment and payments shall be made as fol- "lows, to wit:

By Article 15, Section 2, it is provided:

> "The party of the first part further agrees "that *whenever* the said *Chief Engineer shall*

"*furnish to* it, the said first party, *his certif-*
"*icate* that all the stipulations and coven-
"ants in this agreement contained, to be by the
"said second party kept and performed, have
"been by said party well and truly observed
"and carried out, and that the said first par-
"ty's railroad herein proposed and agreed to
"be built, has been by said second party con-
"structed, built, completed and finished in
"all respects, in full conformity with the
"covenants and agreements hereinabove in
"that behalf made by said second party, and
"shall with said certificate also present his,
"the said Chief Engineer's , estimate of the
"amount and value of the various kinds of
"work done by said second party under the
"terms of this agreement, *which said esti-*
"*mate shall be final and conclusive between*
"*the parties hereto*, then the said first party
"shall and will pay to the said second party
"the sum or sums, if any, shown by said
"final estimate to be due to said second
"party under the terms of this agreement,
"and will also pay so much of the said sum
"of five hundred thousand dollars thereto-
"fore retained by said first party as has not
"been previously paid to said second party.
"*Provided that the entire amount of com-*
"*pensation so to be paid to said second*
"*party, as in this article provided, shall*
"*not exceed the said sum of $3,954,600.*"

By Art. 16. Sec 3:

"It is further mutually understood and
"agreed, by and between the said parties,
"that, in case the said second party shall be
"by said Chief Engineer required, in writing,
"to furnish any material, or to do any
"work not hereinabove required of and

"agreed to be furnished or performed by "said second party; or in case the said sec- "ond party shall in like manner be required "by the said Chief Engineer to furnish and "erect any structure of a more expensive "design or plan than that called for by the "standard plans of said first party, and herein- "above by said second party agreed to be fur- "nished and erected, then and in every such "case the said second party shall furnish such "material or do such work, or shall furnish "and erect such more expensive structure "as aforesaid, as the case may be, and shall "receive from said first party such just and "reasonable compensation for such material "or work, or for such more expensive struc- "ture so as aforesaid required of him, as the "said Chief Engineer shall fix and deter- "mine."

Under all these provisions, no matter which is allowed to control, the contract price is a liquidated demand.

1st. Under Article 15, Section 1, it is absolutely liquidated in words and terms in the contract.

2d. Under Article 15, Section 2, it is liquidated by the provision which makes the estimate of the Chief Engineer final and conclusive between the parties hereto.

If there was any extra work ordered in writing, or any additional structure or more expensive plan, as provided under Article 16, Section 3, the compensation was also to be fixed and determined by the Chief Engineer.

THE AUTHORITIES ARE UNIFORM TO THE EFFECT THAT THE FINAL CERTIFICATE, IN THE ABSENCE OF

FRAUD OR MISTAKE, IS AN ABSOLUTE BAR, AND BINDING UPON BOTH PARTIES.

Kihlberg *v.* U. S. 97 U. S., 398.
Sweeney *v.* U. S., 109 U. S., 618.
Mundy *v.* Louisville & N. R. R., 67 Fed. Rep., 633.
Brayman *v.* Ann Arbor R. Co., 85 Fed. Rep., 579.
Sweet *v.* Morrison, 116 N. Y., 19.
Smith *v.* the Mayor, 12 App. Div., 391.

As to the sum of $3,895,798.79, certified by the Engineer, there can then be no question but that it was a liquidated amount in the strictest sense.

(*b*). Nor was the sum of $34,598.90 credited by the defendant to the plaintiff in the receipt for materials sold and for rebates and other matters of that description an unliquidated or unascertained amount.

The Referee, as to the amounts stated in the receipt, expressly finds "that said receipt and paper " contained an accurate, truthful and UNDISPUTED " account of all dealings between said parties, ex- " cept in the matter of the forfeiture of the $40,000 " deducted for time forfeiture, the $9,558.63 for nut " locks embraced in the $3,626,865.20 and the lum- " ber hereinafter referred to and herein valued at " $2,425."

See Referee's Findings, page 116, folio 347.

The construction put upon this finding by the learned judges in the court below was that the Referee used the word "undisputed" as synonymous with the word "liquidated;" that he was evidently satisfied from the testimony that the prior transactions between the parties were such that

the sum of $34,598.90 was no more open to dispute than was the sum of $3,895,798.79, to which the chief engineer had certified.

See Opinion Lacombe, J., Chicago, Milwaukee & St. Paul R. R. Co. *v.* Clark, 92 Fed. Rep., 968, at page 982.

That the learned Judge correctly interpreted the finding clearly appears from a reference to the opinion written by the Referee, wherein he says:

> " The claim of Clark against the company
> " for the sum of $3,930,397.69 was a liquidat-
> " ed sum, liquidated by the umpirage of the
> " Chief Engineer, as proved by the final cer-
> " tificate and estimate, and by this receipt
> " prepared by the Company. * * *
>
> " Had it been an unliquidated or undis-
> " puted claim, or a claim upon a *quantum*
> " *meruit* requiring a valuation of worth or
> " material, different considerations might
> " apply, but these are properly speaking un-
> " disputed claims. They are claims which
> " the Company had no right to dispute, and
> " the written concession contained in this
> " receipt by Clark was based upon no con-
> " sideration whatever."

See Referee's Opinion, page 81, fols. 241-242.

If this Court were permitted to look into the record, it would find that the sum of $34,598,90 was, in fact, settled upon and fixed long prior to the signing of the receipt.

Mr. Hegeman, the superintendent in charge of the work under Mr. Clark, testified:

> " I stated that $3,930,397.69 was the amount
> " earned under the contract and for mate-

" rials sold to the Company. Of that amount
" I said $34,598.90 was material sold by Mr.
" Clark to the Company. Those materials
" were bridge ties, some grade ties, timber,
" various construction materials. * * *
" I arrived at those figures in this way; the
" accounts were made up by our bookkeeper
" and the accounts as to freight, charges,
" etc., our account was made out and a
" counter-account was made out by the Chi-
" cago, Milwaukee & St. Paul, and the two
" bookkeepers got together and checked their
" accounts, and that is the result of it, a
" statement of it."

See Testimony of Hegeman, page 256, fols. 765-766.

Mr. Kimball, the assistant chief engineer for the plaintiff in error, also testified:

" The aggregate amount of the monthly
" estimates with which Mr. Clark was cred-
" ited is $3,895,798.79. * * Other credits
" were made to Mr. Clark. There were a
" series of vouchers aggregating in the whole
" $34,598.90. * * (Paper handed witness.)
" This is the voucher for that sum; that is
" the voucher that includes the credit for
" lumber taken off of Mr. Clark's hands at
" the time of the completion of the con-
" tract."

See testimony of Kimball, page 322, fol. 964.

Aside from the findings of the Referee and the construction put upon them by Judge Lacombe, it is clear that the statement of that amount as due to the plaintiff in the receipt prepared by the defendant is an admission binding upon it which pre-

cludes the contention that the same was not a fixed and undisputed amount, and hence a liquidated claim as between the parties. This was the view taken by Judge Wallace.

In his opinion the learned Judge said:

> " It is conceded that as to the part of the " plaintiff's demand established by the certifi- " cate of the engineer, it was a liquidated " and undisputed demand against the de- " fendant in the sense in which these terms " are used in considering the validity of a " promise to accept a part payment in satis- " faction of the whole demand. The other " part of the plaintiff's demand that for the " materials, etc., purchased of plaintiff by " defendant was, according to the Referee's " finding, undisputed in fact between the " parties; and this being so, it is quite un- " necessary to inquire whether it was origin- " ally one in respect to which there might " have been a fair difference of opinion be- " tween the parties as to the amount due. " The statement of account rendered by the " defendant is evidence as against the de- " fendant, not only that it was an undisputed " demand, but one the amount of which had " been ascertained by the parties. If the " amount had been ascertained, it was a " liquidated demand. As no facts appear in " the findings of the Referee to the contrary, " it is to be concluded that this part of the " plaintiff's demand was also liquidated as " well as undisputed by the defendant."
>
> Chicago, Milwaukee and St. Paul R. R. Co. *v.* Clark, 92 Fed. Rep., 968, at page 985.

In every view of the case, therefore, the amount

due to the plaintiff, $3,930,397.69, was a wholly liquidated demand.

2d. *Not only was the amount due to the plaintiff a fixed and liquidated sum, but the amount of every payment and offset deducted by the defendant was likewise a fixed and liquidated amount.*

The payments and offsets conceded by both parties to have been properly made and deducted are the following items:

(A). Amount paid in money, material, labor, and transportation,	$3,626,865.20	
Less payment for nut-locks	9,558.63	$3,617,306.57
(B). Additional amount deducted for transportation,		50,000
(C). Amount retained as security for liens, etc.		40,000
		$3,707,306.57
As already shown under this Point there was no dispute between the parties as to the amount earned,		$3,930,397.69
Nor was there any dispute as to the defendant being entitled to the above credits for.		3,707,306.57
Leaving a balance of		$223,091.12

This balance; it is submitted, is a wholly liquidated demand because it is simply the difference between amounts concededly due and not arrived at by the settlement of any dispute whatsoever.

It is just as much a liquidated claim as if the plaintiff had a claim against the defendant on a promissory note for $3,930,397.69 and the defendant

had a claim against the plaintiff on a note for $3,707,306.57.

Of course it could not be said that the difference between the amounts of the notes, $223,091.12, was unliquidated in any sense.

IN OTHER WORDS, A DEMAND CANNOT BE SAID TO BE UNLIQUIDATED IF IT CAN BE ASCERTAINED BY THE SIMPLE PROCESS OF CALCULATION.

And so here the difference between the amounts concededly earned and the amount concededly paid is a wholly liquidated demand.

2d. WE ARE THUS BROUGHT TO THE CONSIDERATION OF THE OTHER PROPOSITION: WAS THERE A BONA FIDE DISPUTE BETWEEN THE PARTIES WHICH WAS SETTLED UPON A SUFFICIENT CONSIDERATION, WHICH PRECLUDES THE RECOVERY BY THE PLAINTIFF OF THE DIFFERENCE BETWEEN THE LIQUIDATED DEMAND OF $223,091.12 AND THE AMOUNT PAID THEREON, $173,532.49, VIZ.: $49,558.63.

In considering this question it must be remembered that it is not claimed that there had ever been a settlement between the parties prior to the giving of the receipt.

There had been no going over the accounts *pro* and *con* and the receipt given as a release of the mutual settlement of their differences.

The Referee expressly found "that no other final settlement of the accounts in said contract had been had between the plaintiff and the defendant at the time that the said last-mentioned paper was signed and delivered."

See Referee's Finding, page 116, folio 247.

Hence the sole question for consideration is what is the legal effect of the receipt under the facts

found by the Referee as a release and discharge of an indebtedness legally due?

As to none of the items mentioned in the receipt was there any dispute as to their *amount*, and with the exception of the two above mentioned there was no dispute whatsoever between the parties as to the *right* to deduct them. In the payment of the balance of $173,532.49 stated in the receipt, the defendant did not pay one penny more than it was legally bound to pay, and which amount it was conceded was due to the plaintiff in any event.

In the language of Judge Wallace:

> "The case is not precisely one where the "debtor refuses to pay the whole of an un- "disputed and liquidated demand and exacts "a promise from his creditor to receive part "in satisfaction of the whole; strictly it is "one where the creditor having two undis- "puted and liquidated demands against a "debtor and the debtor claiming to have "cross demands and counter-demands against "the creditor refuses to pay the creditor's "demands unless the validity of the cross- "demands is acknowledged and their amount "allowed to him by the creditor.
>
> "By the statement of account and the re- "ceipt annexed to it, the defendant in fact "took this position and notified the plaintiff "that as a condition to paying the demands "which it conceded to be due the plaintiff, "the latter must allow and deduct the deb- "ited items for the nut locks and the forfeit- "ure. Upon this state of facts, a promise to "allow the whole amount of the cross-de- "mands has no consideration to sustain it, "because in contemplation of the law no "benefit could accrue to the promisor and "no injury to the promisee. The promisor "derives no benefit, because he allows the

" whole. The promisee is not injured because " he relinquishes nothing."

Opinion Wallace, J., Chicago, Milwaukee and St. Paul R. R. Co. *v.* Clark (*supra*).

In other words, where there are disputed claims and conceded claims, the disputed claims cannot be discharged or released by payment simply of the conceded claims.

There must be a new consideration of some kind to settle and discharge the disputed claims.

If the defendant had said we owe you $173,532.49 in any event and there is a dispute between us as to whether or not we owe you $49,558.63. If you will relinquish your claim to the disputed items, we will pay you $180,000 in full payment and satisfaction, then, of course, the receipt of the sum of $180,000 in full payment and satisfaction would be a bar to any recovery by the plaintiff on the disputed items. *There would then have been a new consideration.* But, in this case, there was not one dollar paid by the defendant in consideration of the release by the plaintiff of the disputed claims.

There was no mutual concession in this case to support a settlement, because the defendant has not paid one penny more than was concededly due by it under the contract, giving to it full credit for the disputed items. A release by the plaintiff of his rights would under such circumstances be a gift pure and simple to the defendant of $49,558.63 for which he received no consideration whatsoever.

His agreement, to release, no matter how binding it might be in its language, would be a *nudum pactum* and hence unenforcible.

3d. THAT AN ACCORD TO BE BINDING MUST BE BASED UPON A SUFFICIENT CONSIDERATION IS THOROUGHLY WELL SETTLED BY ALL THE AUTHORITIES.

We cannot do better than quote from the opinion of Judge Lacombe in the Court below, declaring what is known to the law as "accord and satisfaction."

The learned Judge said:

> "The agreement between parties which is "known to the law as 'accord and satis-"faction' is a contract, and like all other "contracts it needs a consideration to make "it valid. Without consideration it is *nudum* "*pactum*.
>
> "The consideration may present itself in "many different shapes, It may be found "in premature payment; in payment in some "manner different from that bargained for "in the original contract; in the giving of "some desired article in place of money; in "the giving of further security or of differ-"ent security for the reduced amount; in "mutuality of concession; in abandonment "of a right to litigate or to appeal. But in "some form or other a consideration must "be found. There must be some advantage "or presumed or assumed advantage accru-"ing to the party who yields his claim." * *
>
> "The rule of law as to accord and sat-"isfaction is usually stated thus:
>
> "Payment by a debtor of a part of his liqui-"dated debt is not a satisfaction of the whole "unless made and accepted upon some new "consideration, but where the debt is un-"liquidated, the rule does not apply." When, "however, a creditor's claim is made up in "part of an amount so adjusted by agree-

" ment of the parties that the debtor cannot
" in good faith contest it, and in part of an
" amount not thus adjusted, and the debtor
" pays only the adjusted portion of the claim
" and insists on the release of the entire or
" unadjusted portion, without any new con-
" sideration moving to the creditor, reason
" and principle would require a decision that
" there had been no accord and satisfaction;
" and except for the few cases referred to
" above where the point was not discussed
" the authorities are in harmony with such
" a decision.

" The rule might be more accurately
" stated: " Payment by a debtor of a liqui-
" dated amount, presently due, and to which
" he has no defense that can be urged in
" good faith or with color of right, is not by
" itself a sufficient consideration to sustain a
" release by the creditor of other unliquidated
" claims against the debtor."

Opinion Lacombe, J., Chicago, Milwaukee & St. Paul R. R. Co. *v.* Clark, 92 Fed. Rep., 968, at page 976.

The conclusions of the learned Judge, it is submitted, are fully borne out by the authorities.

Fire Ins. Assn. *v.* Wickham, 141 U. S., 564.
U. S. *v.* Bostwick, 94 U. S., 53.
McKay *v.* Myers, 168 Mass., 312.
Currran *v.* Rummell, 118 Mass., 483.
Perkins *v.* Lockwood, 100 Mass., 249.
Hodges *v.* Truax (Ind.), 49 N. W. Rep., 1079.
Myers *v.* Green (Ind.), 51 N. E. Rep., 942.

Marion *v.* Heimbach (Minn.), 64 N. W. Rep., 386.
Fletcher *v.* Wurgler, 97 Ind., 223.
McIntosh *v.* Johnson, 70 N. W. Rep., 522 Neb.

In Fire Ins. Assn. *v.* Wickham (*supra*), this Court expressly held that where a certain sum was due for loss upon an insurance policy, a release of the entire sum, upon payment of a part, was without consideration, and the insured could still sue and recover the residue.

In that case, the payment of the part of the claim was made before it actually came due, but this Court said that such pre-payment was not a good consideration for the release of the residue, because it was not offered by the one party and accepted by the other as an element of the contract, and, therefore, formed no consideration.

4th. THE AUTHORITIES RELIED UPON BY THE DEFENDANT IN NO WAY CONTROVERT THE RULES OF LAW ABOVE STATED, AND ARE CLEARLY DISTINGUISHABLE IN THEIR FACTS FROM THE CASE AT BAR.

Every one of the cases cited by the defendant was examined and distinguised by Judge Lacombe, and it would be a work of supererogation to do more than refer to the discussion of the authorities in the opinion of the learned judge.

It is, however, desired to call attention to two cases in the State of New York, particularly relied upon by the defendant, viz.:

Fuller *v.* Kemp, 138 N. Y., 231.
Nassoiy *v.* Tomlinson, 148 N. Y., 326.

In Fuller *v.* Kemp (*supra*), a physician sought to recover for professional services upon a *quantum*

meruit, no agreement having been made in advance as to the rate to be charged.

The Court said:

> " The original contract which the law im-
> " plied was an agreement on the part of the
> " defendant to pay the plaintiff what his
> " services were reasonably worth. From the
> " very nature of the case a further agree-
> " ment must be reached by the parties fixing
> " the value of the services, or else resort
> " must be had to a judicial determination
> " for that purpose." * * * * " Under
> " such circumstances the assent of the cred-
> " itor to the terms proposed by the debtor
> " will be implied, and no words of protest can
> " affect the legal quality of his act. Where
> " the demand is liquidated, and the liability
> " of the debtor is not in good faith disputed,
> " a different rule has been applied.
>
> " In such cases the acceptance of a less
> " sum than is the creditor's due, will not, of
> " itself, discharge the debt, even if a receipt
> " in full is given. The element of a consid-
> " eration is lacking and the obligation of the
> " debtor to pay the entire debt is not
> " satisfied."

In Nassoiy *v.* Tomlinson (*supra*), a real estate agent brought an action for commissions on a sale, the amount of which had not been agreed upon by the parties.

In both the Fuller and the Nassoiy cases the plaintiffs' claim was a wholly unliquidated demand, and both cases are clearly within the exception to the general rule that—

> " Payment by a debtor of a part of his
> " liquidated debt is not a satisfaction of the
> " whole, unless paid and accepted upon some

" new consideration, but where the debt is
" unliquidated, the rule does not apply."

When asked to apply the doctrine laid down in those cases to a case not strictly within the limits of the facts in those decisions, the Court of Appeals of the State of New York in a subsequent case said:

" In these cases (Fuller *v.* Kemp, *supra*,
" and Nassoiy *v.* Tomlinson, *supra*,) the doc-
" trine of accord and satisfaction was carried
" to the extreme limit and it is not our pur-
" pose to further extend the rule."

Eames Vacuum Brake Co. *v.* Prosser, 157, N. Y., 289 at page 299.

There was then no accord and satisfaction evidenced by the receipt in this case.

By the payment of the sum of $173,532.49, the plaintiff received only the amount which he was legally entitled to in any event and the rule that a debt concededly due cannot be discharged by the payment of a part is applicable.

(*a*). Because the amount due the plaintiff was a liquidated demand.

(*b*). Because there was no dispute between the parties which was settled upon a new consideration

Third.—**The legal effect of the receipt as an account stated.**

(1st). The following finding was made by the Referee:

18.

" That no account was ever otherwise than
" by said paper and the receipt of said money

"stated of the transactions under and con-
"nected with said contract between the plain-
"tiff and the defendant."

See Finding, page 117.

This finding of the Referee is simply that independent of and leaving out of consideration the receipt there was no account rendered or agreed upon between the parties.

The Referee did not find either as a matter of fact or as conclusion of law that the receipt was an account stated, or that it was an account agreed upon.

All that was intended by the finding and all that it is in effect is that there was no claim of any other account having been rendered or stated between the parties.

It is confidently claimed that all the necessary elements to make this receipt an account stated are lacking.

The receipt itself does not contain, nor does it pretend to contain, the account to be adjusted or settled. It does not contain any items of account. It is not in the form of an account. It contains a summary of recitals of items in gross, and of facts which are not proved to be true, but on the contrary, held by the Referee to be false.

The Referee found that the receipt "contained an "accurate, truthful and undisputed account of all "dealings between said parties, *except in the* "*matter of the $40,000 deducted for time for-*"*feiture, the $9.558.63 for nut locks embraced in* "*the $3,626,865.20 and the lumber hereinafter re-*"*ferred to, and herein valued at $2,425.00.*"

See Referee's Finding, p. 116, fol. 346.

No account had ever been rendered by the defendant to the plaintiff, either in detail or in gross. No

final certificate or allowance of the engineer had been ever served upon, or delivered to, the plaintiff. The account in gross was in the possession of the vice-president here in the city of New York, and yet it was not rendered, but withheld. The engineer's certificate upon the defendant's proof was in the possession of the defendant, and yet neither it nor any copy of it was shown to the plaintiff.

(2d). *As to the legal effect.*

There are at least two reasons why the receipt does not constitute an account stated.

(*a*). The minds of the parties never met. This is absolutely necessary to make the account stated. The principle is well stated in the language of Judge EARLE:

> "But what is an account stated? It takes
> "two parties to make one, the debtor and
> "creditor. There must be a mutual agree-
> "ment between them as to the allowance
> "and disallowance of the respective claims,
> "and as to the balance as it is struck upon
> "the final adjustment of the whole account
> "and demands of both sides. Their minds
> "must meet as in making other agreements,
> "and they must both assent to the accounts
> "and balance as correct."
>
> Stenton *v.* Jerome, 54 N. Y., 484.
> Champion *v.* Joslyn, 44 N. Y., 663.

It can hardly be said in the face of these decisions that a receipt or paper signed by a party having no knowledge of the facts, without possession of either accounts or final certificate in the absence of the other party or other communication from him, can constitute an account stated, in which the minds of the parties have met.

(*b*). It is not an account stated by acquiescence or acceptance.

It needs no argument to sustain this proposition. In order to create an account stated in this manner, it is necessary that some account should be presented; that the account should be presented and retained without objection; it should be an account containing some details and items which would give the party receiving it an intelligent idea of its elements.

None of these facts can be stated as existing in regard to this receipt. No account was made, delivered or left with the plaintiff.

As to the effect of the receipt as an account stated, Judge Wallace said:

> "By signing the receipt and acquiescing
> "for a considerable period in the correctness
> "of the account rendered by the defendant,
> "the plaintiff was not precluded from recov-
> "ery. An account stated is an admission
> "that the account is correct, and if the party
> "to whom it is rendered omits to communi-
> "cate objections to the other party within a
> "reasonable time, an inference may be drawn
> "that he was satisfied with it. But there
> "is no arbitrary rule of law which renders
> "the omission to object in a given time
> "equivalent to an actual agreement or a
> "consent of the correctness of the account.
> "An account settled is stronger evidence
> "and requires more proof to overcome it
> "than a mere account stated. But the
> "parties are never concluded except by the
> "statutes of limitation from proving the in-
> "correctness of the account unless the case
> "is brought within the principles of an estop-
> "pal *in pais* or of an obligatory agreement

" between them (Lockwood *v.* Thorne, 18 N.
" Y., 285; Perkins *v.* Hart, 11 Wheat., 237)."

Chicago, Milwaukee and St. Paul R. R. Co. *v.* Clark, 92 Fed. Rep., 968, at bottom of page 986.

It is, therefore, respectfully submitted that the receipt, in no aspect whatsoever, is a defense or bar to the recovery of the plaintiff in this action.

Point V.

The receipt could not, in any event, be a bar to the plaintiff's recovery or of itself even be prima facie evidence of payment, because the Referee expressly found that it contained an untruthful and false statement.

As has been stated, the sole defense to the payment of the plaintiff's claim was this receipt. But the Referee has found that as to the only two items of plaintiff's claim for which recovery has been allowed that the receipt was inaccurate and untruthful.

First.—In the statement that there had been paid to the plaintiff in money, materials and transportation the sum of $626,865.20.

Second.—In that the $40,000 penalty for overtime had been incurred by the plaintiff.

(A). As a matter of fact, the sum of $3,626,865.20 had not been paid because the defendant had

included in that amount the sum of $9,558.63, the undisputed cost of the nut-locks. This sum it had no right to deduct, for the question of liability for this sum had been left open for the decision of the chief engineer of the defendant, who, in turn, had referred it to the counsel of the defendant. At the time of the signing of the receipt no opinion in regard to the liability of the plaintiff for that amount had been given.

(B). The plaintiff had not become liable for the $40,000 penalty for overtime, because the failure of the defendant to provide rights of way excused the delay.

That the receipt was false and untrue in respect to these two items of $40,000 and $9,558.63, which latter sum did not appear specifically as deducted in the receipt itself, but was hidden and included in the aggregate sum of the amounts alleged to have been paid, was expressly found by the Referee.

"That said receipt and paper contained an accurate, truthful and undisputed account of all dealings between said parties, EXCEPT IN THE MATTER OF THE $40,000 DEDUCTED FOR TIME FORFEITURE, THE $9,558.63, EMBRACED IN THE $3,626,865.20 AND THE LUMBER HEREINAFTER REFERRED TO AND HEREIN VALUED AT $2,425."

See Referee's Findings, page 116, folio 346.

Irrespective of the other questions raised, it is respectfully submitted that a defense founded solely on a false paper made up by the defendant itself, containing an untrue statement, and so found by the Referee, cannot be sustained.

Point VI.

If this Court were at liberty to reopen and re-examine all the findings of fact made by the Referee, the evidence taken upon the trial not only fully supports those findings in every particular, but contrary findings would have been against the weight of evidence.

Up to this point, this case has been considered only on the technical objections raised by the defense.

It is now proposed to show, although perhaps unnecessary under the plaintiff's contention, that the equities are wholly in favor of the recovery had by him.

The only items to which attention need be called and the testimony taken in support of them, are the three already considered.

First.—AS TO THE RIGHT TO DEDUCT THE $40,000 PENALTY.

(A). *There was no provision in the original contract which referred to or provided in any way for the deduction of $40,000 from the plaintiff, provided the work was not finished in time.*

The contract provided that the plaintiff should have until the 1st day of August, 1887, in which to complete the work.

See Contract, Article I, Section 2, page 139, fols. 445-446.

There was a supplemental contract in writing made between the parties in reference to this work

on July 12th, 1887, but in that contract no provision was contained which covered or in any way related to a forfeiture for non-completion within the time fixed.

The defendant, however, claimed that after the making of the original contract and prior to the supplemental contract, an agreement was entered entered into in relation to the $40,000 forfeiture.

It sought to establish that contract simply by correspondence.

On March 19th, 1886, Mr. Miller, the general manager of the defendant wrote the following letter to the plaintiff:

"March 18th, 1886.

HEMAN CLARK, Esq.,
2066 Fifth Ave., New York.

Dear Sir.—I think there is some misunderstanding as to the consideration to be paid for. When Mr. Hegeman's despatch arrived here the other day Mr. Kendall was absent, and I could not lay my hands on the proposition you made, dated January 26th. I telegraphed, in reply, that the consideration was to be $19,500 per mile, understanding the contract to require completion June 1st, 1887. I find, however, that the contract was made for completion August 1st, and therefore the consideration should be $3,914,600, instead of $3,954,600. You will readily see this from the fact that your written bid of Jan. 26th was $3,990,000; June 1st, $3,950,000; August 1st, while the contract as signed was $3,954,000 or $4,000 more than you offered to do the work for. The agreement was $19,500 per mile, completed June 1st; $40,000 off if allowed to August 1st.

Yours truly,

ROSWELL MILLER,
Gen'l Manager."

See Letter, page 326.

On April 1st a telegram was sent by Mr. Miller to Mr. Clark as follows:

"MILWAUKEE, April 1st, 1886.

HEMAN CLARK,

2066 Fifth Avenue, New York.

Have you heard from Hegeman in regard to error in contract? We are perfectly willing to let the compensation stand as it is, completion to be June 1st, and if at any time you desire till August 1st, you can have the additional two months, the compensation to be reduced forty thousand dollars ($40,000), as stated in your proposition, upon making the same to me in writing.

ROSWELL MILLER."

See Telegram, page 327, fol. 979.

To this telegram the defendant contended an answer was sent by telegram by Mr. Clark.

The telegram was not produced, but testimony was given tending to show that it had been lost.

Under the plaintiff's objection, Mr. Miller was permitted to give the contents of the telegram according to his recollection, which was: "Your understanding correct. We will forfeit $40,000 if road not completed June 1st."

See Testimony, page 327, fol. 981.

One other officer of the defendant gave testimony somewhat similar to that of Mr. Miller.

See Testimony of Kimball, page 314, folio 941.

It is a noteworthy fact that, while the contract to which it relates and the letters and telegrams sent

by Miller to Clark are to be found, this telegram, the most important of all the evidence, cannot be found. That so important a paper, if it ever existed, should be missing, in a well organized railroad office, is surprising.

The defendant denies that he ever sent such a telegram or authorized the sending of it.

See testimony of Clark, pp. 442–443, fols. 1326–1327.

The testimony also shows that an attempt was made by Mr. Miller to make the deduction bodily in the contract as it was originally drawn, and was sent in that condition for the signature of Mr. Clark after it had been signed by Mr. Miller.

The lump sum or price to be paid was inserted as $3,914,600, and the time of completion fixed as August 1st, 1888.

Mr. Hegeman, representing Mr. Clark, perceiving the error, telegraphed Mr. Miller, who sent him a reply, giving him authority to make the proper change, as follows:

"MILWAUKEE, March 12, 1886.

W. W. HEGEMAN,

Yonkers, New York.

The contract should be at the rate of nineteen thousand five hundred dollars per mile. You can correct to this amount and execute in New York.

ROSWELL MILLER.

See Telegram, p. 325.

The contract price, at $19,500 per mile, for 202.8 miles, amounts to $3,954,600.

Before the execution of this contract by Heman Clark the change of these figures was made, and he entered upon the contract, as follows:

"In Article 15, near the beginning and at the end, the amount of $3,914,600 was changed so as to read $3,954,600 before delivery of this contract."

This is the contract which is sued upon by the plaintiff, and is annexed to the defendant's answer.

The contract, as changed in New York by the permission of Mr. Miller, and resulting in the deduction of $40,000 from the original bid of $3,990,000, was undoubtedly the contract agreed upon between the parties, making full allowance for the $40,000 of penalties.

The testimony shows distinctly that there has been either a persistent effort on the part of Mr. Miller to procure a further deduction of $40,000, or that there is an honest confusion in his mind which resulted in this mistake.

All parties concede that Mr. Clark's original bid for the work was $3,990,000, and that after the preliminary talk about the $40,000 it was finally practically adjusted as at the rate of $19,500 per mile, which is $3,954,600, and almost equal to a complete deduction of $40,000 from the original bid.

This is shown by Mr. Miller's own evidence and the statements contained in his letters.

He states distinctly that Clark was to have, if completed June 1st, $3,990,000; if it was completed August 1st, $3,950,000. This is the exact language of the testimony:

> "The completion was to be the following year; if completed June 1st, $3,990,000. If completed August 1st it was to be for $3,950,000—$40,000 less.
>
> There were those two separate amounts I have stated—$3,990,000, if June 1st; $3,950,000, if August 1st."
>
> See testimony, pages 324–325, fols. 972–973.

The difference of $4,600 seems to be the result of a compromise between the demand for the $40,000 for forfeiture and the demand for the doing of the work at $19,500 a mile.

This same testimony is repeated in the letter of March 19th, from Mr. Miller to Mr. Clark, in which he says:

> "You will readily see this from the fact that your written bid of January 26th was $3,990,000 June 1st, $3,950,000 August 1st, while the contract as signed was $3,954,000, or $4,000 more than you offered to do the work for."

See Letter, page 326, fol. 977.

An attempt in this letter is made to make use of the simple difference of $4,600 with which to make an additional deduction of $40,000 more, and to pretend that the question as to the date of finishing being fixed at August 1st was not known to Mr. Miller at the time of the sending.

Now the bids are not produced. They were placed in the custody of the defendant, and the responsibility for their non-production rests with it.

The insertion of a $40,000 penalty had been resisted by the plaintiff from the start. No mention of such a provision is found in the agreement. The allowance had been substantially made by the plaintiff in the deduction made from his first bid of $3,990,000. A further deduction was successfully resisted when the attempt was made a second time when the contract was executed.

All these facts and circumstances seem to indicate that the $40,000 had been taken off the original price of $3,990,000, and was not intended to be taken off a second time.

There is another important element to be considered as to whether there was any telegram sent in

the form and actual words as given by the defendant's witnesses.

The telegram, as sent, does not appear in its language to be an answer to the one sent to Clark by Mr. Miller.

The first telegram is in the following language:

> "We are perfectly willing to let the compensation stand as it is, completion to be June 1st, and if at any time you prefer until August 1st, you can have the additional two months; the compensation to be reduced $40,000, as stated in your papers, upon communicating the same to me in writing."

This telegram provided for the following conditions:

1st. The alteration of the time of completion to June 1st. This was never altered or changed in any way.

2d. If Clark desired until August 1st, the compensation was to be reduced $40,000.

3d. If at any time he desired the additional two months up to August 1st, and submit to the penalty, he could have the same upon communicating it to Mr. Miller in writing.

No communication asking for the extension is produced. No proof is adduced that any extension was asked.

The alleged telegram of Clark to Miller in the language given, is not in any way an answer to the telegram of Miller to Clark of April 1st, for the following reasons:

1st. It does not consent to the change of date to June 1st.

2d. It does not ask for the additional time to August 1st.

3d. The alleged telegram does not call for an immediate answer, for it states that if at any time additional time was desired, it would be granted on application in writing.

It is evident that either no telegram was sent, or that the defendants are mistaken in describing the contents of the one that was sent.

(B). *But there is still a more serious difficulty for the defendant before it could establish this contract, and that is the failure of proof to show that such a telegram was ever sent by Mr. Heman Clark.*

The only proof offered upon this point is that three men living in Milwaukee saw what they called a telegram, containing certain words, and with the name of Heman Clark subscribed.

It was not proved

1st. By whom the paper was delivered.

2d. Whether it was written upon the telegraphic blanks of any telegraph company.

3d. When and where it was received by the defendant.

4th. Whether such a telegram was ever received by any telegraph company.

5th. Where or when it was received by the company.

6th. That Heman Clark ever signed such a telegram.

7th. That he ever sent or authorized the sending of such a telegram.

8th. Neither the destruction of the original telegram, if sent by Mr. Clark, is proven, nor the existence of any such telegram.

It is sought wholly and entirely to make a contract for Mr. Clark, the plaintiff, upon the proof that some one saw a paper containing certain words upon which some one else, not Mr. Clark, had signed his name.

It is confidently submitted that it is established by authority that no party can be bound by evidence contained in a paper, letter or telegram, without the essential elements of proof above enumerated.

The telegram is necessary to the establishment of the contract. If it falls to the ground, the contract falls with it.

The question as to the proper proof of a telegram is well settled at present in our courts.

The primary evidence is the original telegram in the custody of the company at the place where it is sent.

This original telegram, of course, is competent without other proof when found in the handwriting and over the signature of the party.

If the telegram is not in the handwriting of the party sought to be bound thereby, then authority for sending must be proved.

If the original telegram had been destroyed by the company or lost, then the loss may be proved and a copy of the original offered in its stead.

If the transcript of the message delivered to the person addressed is sought to be used, there must be competent proof that the alleged signer did actually send or authorize it to be sent.

The Oregon Steamship Company *v.* Otis, 100 N. Y., 446.

Mattison *v.* Noyes, 25 Ill., 591.

Chisholm *v.* Beaver Lake Lumber Co., 18 App. Court Rep. (Ill.), 131.
Hoenely *v.* Whipple, 48 N. H., 487.
Smith *v.* Easton, 54 Md., 138.
U. S. *v.* Babcock, 3 Dill, 576.
Barons *v.* Brown, 25 Kansas, 410.
Williams *v.* Birckell, 37 Miss., 682.
Gray on Telegraph Com., Secs. 128-137.
Rice on Evidence, page 1015, etc.

It was upon this evidence, and this alone, that the learned Referee found "that the plaintiff made and entered into a supplementary contract, whereby he agreed with the defendant to complete his performance of said contract on or before June 1st, 1887, and to allow the said defendant, by way of forfeiture, in case the said railway were not so completed by the 1st of June, 1887, the sum of $40,000."

See Referee's Findings, page 112, folio 334.

(C). *The evidence, however, conclusively shows, even if the contract of forfeiture as alleged, had been made, that the plaintiff was prevented by the wrongful acts and omissions of the defendant from completing the work under the contract within the stipulated time.*

It will be remembered that the plea of the defendant is that the plaintiff to avoid the forfeiture was obliged to complete upon the 1st of June, 1887. The terms of the contract, however, do not require completion until August 1st. 1887.

It is conceded that the contract was not completed until the 1st of November, 1887, and therefore, after the expiration of both the time limits of June 1st and August 1st, 1887.

The plaintiff claims that the reason that he did not complete within the time limited was the failure of the defendant to supply him with rights of way necessary to the completion of the road, and by reason of certain other acts and omissions of the defendant which prevented the completion of the contract within the stipulated time.

The principal cause of delay was the failure of the defendant to procure the necessary rights of way, borrow pits, waste banks and station grounds

There was a distinct provision in the contract making it obligatory upon the defendant to procure them.

The contract provides in the following language:

> "For and in consideration of the pay-
> "ments, covenants and agreements of the
> "party of the second part, to be by said
> "party made, kept and performed, as here-
> "inabove set forth, the party of the first part
> "hereby covenants and agrees to furnish, at
> "its own cost and expense, and at such time
> "or times as not to delay the execution of the
> "work in this agreement mentioned and re-
> "ferred to, all the lands now or hereafter
> "marked out and designated by the said first
> "party's chief engineer for right of way,
> "borrow pits, waste banks and station
> "grounds of all kinds, as the said lands may
> "be required for the construction of the
> "railroad covered by this agreement."

See Contract, Article 12, Section 1, page 169.

There are also certain other provisions to this contract imposing the following obligations upon the defendant:

The obligation to transport men free of charge.

Article 13, Section 1, p. 170.

To transport tools and implements.

Article 13, Section 2, p. 171.

To transport supplies.

Article 13, Section 3, p. 171.

To transport material.

Article 13, Section 4, p. 171.

There is also an obligation upon the defendant to furnish steel rails, angle bars, track bolts and track spike, and to unload the same without unnecessary delay.

Article 14, Section 1, p. 172.

It will be impracticable to mention all of the delays occasioned by the defendant during the progress of this work.

These delays were substantially, in the absence of evidence to the contrary, conceded by the defendant.

It will only be necessary to deal with the most important delays, as the proof of the existence of any one is sufficient to break the time limit of the contract and avoid the forfeiture.

The most conclusive evidence as to the number of rights of way which were procured after June 1st, is the following list, picked out from Exhibit 51, being a list of the counties, stations and dates of the procuration of rights of way.

APPANOOSE COUNTY.

	Station to Station.		Date.	
	1634	1642	Sept. 23, 1887.	
Rathbun Depot.	1784+68	1815+35.	" " "	Extra for borrow and waste.

PUTNAM COUNTY.

	3302+15	3315+30.	June 7.	
	3406	3412	Aug. 30, 1887.	Extra for station grounds.
Powersville.	3446	3448	Nov. 3, "	Extra width.
	3727+42	3741+50.	June 30. "	Extra for station grounds.
Lucerne.	3791	3791+75.	" 25. "	Extra width.
	3793+10	3794+45.	" " "	Extra width.

SULLIVAN COUNTY.

Osgood.	5027	5032	Aug. 4, 1887.	Extra width.
	5031+50	5033+65.	" " "	Extra width.

GRUNDY COUNTY.

Loredo (Gorham).	391+50	410	June 13, 1887.	Depot grounds.

LIVINGSTON COUNTY.

Chillicothe.	2242+23	2261+25.	June 13, 1887.	Extra width.
	2240+73	2261+25.	" " "	Extra width.
	1774	1757+50.	Sept. 13, "	Depot grounds.
Ludlow.	1728+54	1718+79.	" 23, "	Extra for waste banks.

CALDWELL COUNTY.

	1395	1387+35.	Sept. 19, 1887.	Reservoir.
Braymer.	1158+50	1144	Oct. 21, 1887.	Extra for borrow and waste.
	1140	1124	Nov. 12, 1887.	Extra width.
	1124	1110	Nov. 1, 1887.	Extra width.
Cowgill.	916	885	Sept. 16, 1887.	Extra width.

RAY COUNTY.

	369	366+50	July 12, 1887.	Extra width.

CLAY COUNTY.

	417+43	424	June 8, 1887.	Extra width.
	430+73	436+50	Nov. (?), 1887.	Extra width.
	508	510	Sept. 13, 1887.	Extra width.

MINNEVILLE, HANNIBAL AND ST. JOE CROSSING.

1384	1404	Oct. 27, 1887.	Lease from H. & St. J. R. R.

See Record, p. 374.

By this list it appears that there were twenty-five places where, until after June 1st, 1887, the

rights of way had not been procured. Of these only eight were procured in the month of June; one additional was procured during the month of July; three more were procured during the month of August; six were procured during the month of September; two were procured during the month of October; four were procured during the month of November.

1st. *The delay at Minneville was most conclusively proved.*

The rights of way were asked for in writing upon February 1st, 1887. The letter is from Hegeman to Kimball, dated February 1st, 1887, and reads as follows:

"Mr. F. W. Kimball, Manager Construction, Milwaukee, Wis. Dear Sir: W. E. Dorwin & Co. have served us with notice that, if the Hannibal crossing, near Minneville, is not settled so they can do their work in the favorable time of the year, or in short, if the delay in procuring the right of way forces them to do the work in wet weather, that the added cost of doing the work will be charged to us on force account. Cannot the right of way be procured at this point so that in case a favorable opportunity offers we can have him get at that work and finish it before the spring rain comes on?

Respectfully yours,

W. W. HEGEMAN."

See Letter, Plaintiff's Exhibit No. 5, page 237, fol. 710.

In response the following letter was received from Mr. Kimball, February 3d, 1887:

"February 3d, 1887.

Mr. W. W. HEGEMAN,
Ottumwa, Iowa.

Dear Sir:

The Minneville crossing matter has now been definitely settled, and Mr Appleton will have the line staked out so that Mr. Dorwin can go at it at any time in the spring.

Yours truly,
F. W. KIMBALL."

See Letter, page 320, fol. 958.

Subsequent testimony shows that the statement in this letter is not correct.

On February 28th a second letter was sent by Mr. Hegeman to Mr. Carpenter, Division Engineer, as follows:

"February 28th, 1887.

C. A. CARPENTER, Esq.,
Division Engineer,
Lawson, Mo.

Dear Sir:

Please note copy of Mr. Kimball's letter enclosed, regard to Hannibal crossing, near Minneville. I met Mr. Dorwin at Kansas City yesterday, and I gathered from his statements that there is a considerable piece of the line immediately west of the Hannibal crossing where the right of way is not yet settled. Mr. Dorwin has very large interests that require his attention, and he is anxious to complete his contract with us without further delays. Can you not urge a settlement of the question so that he can go ahead? There seems to be a misunderstanding somewhere, as Dorwin states that he has

positive orders to do no work west of the Hannibal track. * * *

Yours truly,

W. W. HEGEMAN."

See Letter, page 238, fol. 712.

This crossing was not procured until October 27th, 1887. This is positively proved by the written agreement made, executed and delivered on that date permitting the crossing.

The right of way missing until October 27th, 1887, was from Station 1382 plus 50 to 1410, a distance of of 2,750 feet.

See testimony of Hegeman, page 239, fol. 715.

Mr. Hegeman says that the Railroad Company fought for this crossing a year and a half; that it was originally intended to cross at grade, but it was arranged that we should grade a new line for them and come down and take their old line, just keeping inside.

See testimony of Hegeman, page 238, fol. 713.

He also says that the right of way was not procured until the latter part of October, 1887.

See testimony of Hegeman, page 238, fol. 714.

This was the same right of way that had been requested in letters of February 1st and 28th, 1887.

Mr. Russell, plaintiff's witness, testifies that he went there in October, 1887, to put in the connec-

tion for the Hannibal and St. Joe Railroad at Minneville.

Testimony Russell, p. 377, fol. 1130.

The engineer told him that the arrangements had been completed on the day previous for this right of way.

Testimony Russell, p. 378, fol. 1133.

The rest of the work around Minneville crossing had been completed a long time before. The work at Minneville occupied ten days for grading and one day for track laying (p. 382, fol. 1145).

This delay is practically admitted by the defendant's witness and engineer, Mr. Kimball, who testifies as follows:

"There were some delays near Randolph Bluff, owing to the definite location of the bridge not being determined; and there was quite a long delay in regard to the grade crossing of the Hannibal and St. Jo road at Minneville."

Testimony of Kimball, page 316, fol. 946.

The extent of the delays at this point is confirmed by the profile.

An examination of this profile shows that the last of the main work on both sides of the Minneville crossing was done on November 15th, 1886, with the exception of two small fills made March 15th, 1887, and April 15th, 1887.

See Profile from Stations 1380–1410.

The length of the delay from failure to obtain this right of way was at least one year, or, as shown from this record, November 16th, 1886, to October 27th, 1887.

It was not confined to track laying, but covered grading as well.

This is testified to by Mr. Russell, in which he says that the work at Minneville was the last work done, occupied ten days grading and one day for track laying.

See Testimony of Russell, page 382, fol. 1145.

The same is testified to by Mr. Kimball, who testifies:

"All but about a quarter of a mile was finished some time during May 1887. The track laying got down there about the first of November, 1887."

Testimony of Kimball, page 316, fol. 946.

2d. *Delays at Liberty.*

This right of way was asked for by letter from Hegeman to Mr. Kimball on June 13th, 1886. The letter is as follows:

"OTTUMWA, IOWA, June 3, 1886.

F. W. KIMBALL,
Manager Construction.

Dear Sir.—Will you kindly provide right of way for the line near Liberty. It is desirable to open the heavy cuts in the third division at once. At 1068 and at other points I am advised it is impossible to do this on account of delay in rights of way matters.

Respectfully yours,
W. W. HEGEMAN."

See Letter, page 236, fol. 706.

Mr. Hegeman says that afterwards he went over the line with Mr. Kimball and spoke to him about these rights of ways and shortages in rights of way and points where rights of way had not been provided.

See Testimony of Hegeman, page 236, fol. 707.

This delay was also admitted by Mr. Kimball, who testified as follows, when asked about the letter of June 3d:

I do not know when those rights of way were obtained.

Testimony of Kimball, page 337, fol. 1010.

An examination of the progress profile, No. as to Station 1100, near Liberty, shows grading and embankment work done on the following dates:

October 15th, 1886; November 15th, 1886; December 15th, 1886; January 1st, 1887; April 15th, 1887.

It appears conclusively that the rights were needed and asked for on June 1st, 1886, but were not given until the autumn or fall of that year.

The record of obtaining rights of way fails to show when the rights of way were obtained at Liberty.

The following entry appears under head of Clay County:

Liberty Station 1100.

No date, however, is given.

There was also some delay at Station 1068. This station was near Liberty. The right of way was asked for in the letter of June 3d, 1886.

The progress profile shows the first dates of work were July and August, 1886. The record of rights

of way show that rights of way were not entirely acquired here until October 2d, 1886. Station 1057–1072, October 2, 1886, extra width.

3d. *As to the delays south of Lawson.*

This right of way was also asked for by letter.

On July 26th, 1886, Mr. Hegeman writes the following letter to Mr. Kimball as Manager of Construction:

"July 26th, 1886.

Mr. F. W. KIMBALL, Manager of Construction.

Dear Sir—I wish to call your attention to the unsettled right of way at station 400, 470 to 500, 540 to 560, south of Lawson, and request that as little further delay as possible may be given us there.

We have a large force on the work, and already considerable inconvenience and expense has fallen upon the contractor through attempting to open the work at these various points and afterwards being obliged to abandon them and shift his force off.

Respectfully yours,

W. W. HEGEMAN."

See Letter, page 236, fol. 708.

In answer to this claim Mr. Kimball wrote that from a conversation with the right of way agent he understood that all parties have agreed to allow contractors to go on; that as far as questions of law are concerned contractors have been empowered to go on for some time. It was only because the contractors were afraid of some of the loud mouths of those Missouri mossbacks, who threatened to shoot if they went on.

See Letter of Kimball, page 315, fol. 945.

It appears that this railroad was being built in the Jesse James country, and that the engineer

expected the plaintiff to obtain possession of the land himself in face of an armed force instead of providing it in accordance with the covenant of the agreement.

Mr. Kimball nowhere testified that the contents of this letter are true. In fact, it is based only on the statements of the right-of-way agent, and not on Mr. Kimball's own knowledge.

The profile and record show that, notwithstanding that the rights of way were asked for in July, 1886, they were not furnished until sometime after.

The record of rights of way show the following:

Stations.	*Date Acquired.*
417–424	June 8th, 1887.
403–406	November 22d, 1886. Extra width.
381–407+90	November 22d, 1886.
430+73–436+50	November, 1887.
503–517, extra width	October 16th, 1886.
508–510, "	September 13, 1887.
359+50–575+93, extra width	August 30, 1887.

The progress profiles show that while most of the grading was done in July and August, a large portion, by reason of the failure in obtaining right of way, was not done until the year 1887. This shows an apparent delay from the middle of 1886 to the middle and latter part of 1887.

4th. *Delay at Randolph Bluff.*

On June 16th Mr. Whittemore, the Chief Engineer, directed that no work should be done at or near Randolph Bluff until further advised.

Upon June 16th Mr. Hegeman replied in writing, "Yours of 18th inst. and profile of Randolph Bluffs line are at hand. I note what you say in reference to possible changes of line in the future,

and will do no work west of Station 50 until further advised by you."

See Testimony, page 241, fol. 721.

On July 19th, 1886, Mr. Hegeman wrote the following letter:

"July 19th.

"D. J. WHITTEMORE,

"Ch. Eng.

"*Dear Sir.*—I have ordered work suspended on the 30 foot span for Wabash crossing at Chillicothe, as you requested in letter of 16th inst.

"Respectfully yours,

"W. W. HEGEMAN."

See Letter, page 336, fol. 1006.

Mr. Hegeman's testimony is as follows:

> "We were delayed on the Randolph's Bluff matter five or six months. The final western terminus was not defined by the company, and they ordered me not to do work beyond a certain point, Station 50, until the location of the line was finally determined to the terminus at the Missouri River bridge. We got the order to resume work west of Station 50 about September 1st, 1886."

See Testimony of Hegeman, page 241, fols. 721–722.

This delay at Randolph Bluffs was conceded by Mr. Kimball, and in his testimony he testifies as follows:

> "It did make a delay at that point, as
> "they could not enter at that point for two

"or three months, possibly even four; I "can't remember now."

See Testimony Kimball, page 336, fol. 1007.

5th. *Delays at Chickenbristle.*

This was occasioned by defective plans of trestle bridge at this place. It was located over the Fishing River. It caused a delay of three or four weeks.

See Testimony Hegeman, page 254, fol. 760.

This delay is nowhere denied.

6th. *Delays as to fixing of divisional terminals as between Gault and Chillicothe.*

It was at first determined to put the division terminals at Gault, and the change from Gault to Chillicothe was not finally decided until the fall of 1886. This caused a delay of five months. It is shown by Mr. Hegeman's testimony, as follows:

"I remember how long we were prevented from starting foundations at the Chillicothe terminus. The question of the division terminal was not decided until the autumn of 1886, possibly in September. That is the division terminal where the round house and shops were to go. It was originally decided to put them at Gault, some twenty-five miles north. Then Chillicothe came in for a claim for them, and several months elapsed until it was finally decided where it would be located. Chillicothe finally gave a subsidy, and it was located there. It carried with it the divisional terminal and yards. That prevented us from doing any work at Gault until it was decided, which was in the fall of 1886. From the time we were at Liberty to work there until the time we obtained

the right to work there, the question was open for a period of five months."

See Testimony of Hegeman, page 240, folios 719–720.

The determination of right of way was asked for in writing on August 31, 1886.

See Letter, p. 239, fol. 716.

It was again asked for on September 13th, 1886.

See Testimony Hegeman, p. 240, fol. 718.

The progress profile also confirms the fact that no work was done at Gault until November 15th, 1886.

See Profile.

7th. *Other delays.*

There were also other delays resulting from the failure to deliver steels rails.

See Letters to Hegeman from Kimball, January 14th, 1887; February 5th, 1887; March 11th, 1887; pages 332–333.

It is unnecessary, however, to multiply instances of the delays in this work caused by the defendant.

The uncontradicted testimony shows that these delays were serious and for long periods of time.

It further appears that the work was immediately completed after the furnishing of the right of way at Minneville at the Hannibal and St. Jo crossing.

The expedition of the plaintiff is shown conclusively from the fact that the very moment that the

right of way was procured at Minneville, the final grading was immediately done and the track laid.

Mr. Russell testified: "I do not know when that right of way was obtained, not to speak certainly as to the date, as near as I can recollect that, and the only way that I can actually locate it is the fact that the engineer of the company told me the day that I made the connection that the papers for that right of way had only been fixed up the previous day."

See Testimony of Russell, page 378, folio 1133.

There was no unfinished work, except this Minneville work after October 27th, 1887, except some extra work.

Testimony of Russell, page 383, fol. 1149.

8th. *There was also extra work ordered which increased, as a matter of course, the time limit for performance, and thus destroyed the limit.*

The defendant is thus obliged to concede, upon the uncontradicted testimony, the following propositions:

1st. That the rights of way were not procured until after June 1st, 1887.

2d. That they were not procured until after August 1st, 1887.

3d. That they were not procured until after October 27th, 1887.

While not denying this cause of delay on their part, the defendant endeavored by the testimony of Mr. Kimball to claim that these failures to obtain rights of way did not delay the work, because the plaintiff was not ready to do his track laying.

This is denied by the plaintiff in the testimony of Mr. Russell, who says that if the rights of way had been furnished in time, the track would have been laid in time.

Testimony of Russell, pages 377-386.

It is, therefore, submitted that this testimony fully warranted the finding of the Referee that the defendant failed to furnish the plaintiff with rights of way as by said contract it had agreed to do in time to enable the plaintiff to complete his contract prior to the 1st day of June, 1887. That the plaintiff was thereby prevented from completing his contract within the stipulated time.

See Findings 7 and 8, page 112, folios 335-336.

Under the well-established principles of law, this failure on the part of the defendant abrogated the time limit, if any had been fixed, and supported the conclusion arrived at by the Referee that the defendant was not entitled to charge the plaintiff or retain and deduct from the amount earned and payable to him under the contract, the sum of $40,000 as a forfeiture and liquidated damages.

See First Conclusion of Law, page 117.

Second.—AS TO THE RIGHT OF THE DEFENDANT TO DEDUCT THE CHARGE FOR NUT LOCKS.

(*a*). *As to the contract provisions.*

There are no specific provisions in the contract requiring the road to be furnished or built with nut locks.

In other words, the words "nut locks" are not mentioned in words and terms in the contract.

The only provisions of the contract which could

possibly have any reference to nut locks are the following:

1st. "The party of the second part further agrees to furnish and lay in place all the track material required by first said party for 202.8 miles of main track, and for the hereinafter-mentioned side-tracks, of its railroad aforesaid, including in said track material, so by him to be furnished and laid in place, steel rails of sixty pounds per yard; *splices and bolts of the J. T. Clark pattern*, and spikes and ties; and all said material shall be of the said first party's standards and sizes.

"The said second party also agrees to purchase from the said first party all the steel rails, angle-bars and bolts for same, and all the track-spike required for the main and side tracks aforesaid, and to pay for the same at the following rates, to-wit:

"Steel rails, $37 per gross ton, f. o. b. in Chicago.

"Angle-bars, 1.65/100 cents per pound, f. o. b. in Milwaukee.

"Track-bolts, 2.60/100 cents per pound, f. o. b. in Milwaukee and Chicago.

"Track-spike, 2.65/100 cents per pound, f. o. b. in Chicago."

See Contract, Article 6, Section 1, p. 159, fol. 477.

"The party of the first part further agrees to sell to the said second party all the steel rails, angle-bars, track-bolts and track-spike required for laying all the main and side-tracks mentioned and referred to in this agreement, at the prices hereinabove, in Section 1 of Article 6, agreed by said second party to be paid for the said materials respectively."

Article 14, Section 1, p. 172, fol. 515.

"It is further mutually understood and agreed, by and between the said parties, that the said first party has contracted with manufacturers, esteemed to be safe, responsible and reliable, for all the steel rails, angle-bars, track-bolts and track-spikes, which it, the said first party, has hereinabove (in Section 1 of Article 14) agreed to sell and deliver to said second party.

Article 16, Section 6, p. 177, fol. 531.

"For and in consideration of the payments, covenants and agreements of the party of the first part, hereinafter contained, to be by said party duly made, kept and performed, the party of the second part hereby covenants and agrees to *furnish all the material for, and also* to execute, construct and finish in every respect, in the most substantial and workmanlike manner, all the work hereinafter specified and required by said first party to be done in the construction and completion of said first party's line of railroad, extending, as aforesaid, from a point in the City of Ottumwa, Iowa, to Harlem Station, in Clay Couniy, Missouri, a total distance of 202.8 miles."

See Contract, Article I, Section 1, p. 148, fol. 444.

(*b*). As to the facts.

These nut-locks were a spiral of spring steel, placed over the bolt against the angle-bar on one side and against the nut on the other. As you press the spiral together that makes a constant pressure against the nut. The bolt goes through the rail and connects the angle-bar. The washer is between the nut and the angle-bar supporting the joint.

See Testimony Hegeman, page 245, fol. 733.

The plaintiff was ordered to put these nut-locks on the road at the beginning of the work. He protested against their use, and finally yielded under the promise that the matter would be adjusted at the completion of the road.

The following is Mr. Hegeman's version:

"I asked him (Mr. Kimball) what he wanted to do about the use of these nut locks, and about compensation for them, and stated to him that they were not embraced in the contract, and that I wanted to know his pleasure in the matter. He told me that he wanted them put on; that at that time it was a standard with the St. Paul Road—at least, that they were using them. As to compensation to put them in place, that they would send them down and charge them to us, and the matter would be adjusted finally at the end of the work."

"I objected to putting them on at the expense of the contractor. That was the occasion of his saying that it would be adjusted afterwards. The nut-locks were sent with the other track material by the Chicago, Milwaukee & St. Paul Road, and charged to us, and taken out of our contract under our protest: $9,558.63."

See Testimony of Hegeman, page 245, folios 734–735.

Mr. Hegeman states positively that he never saw the plan.

He testified as follows:

"As to Mr. Whittemore's statement that "I was shown a joint set up with the J. T. "Clark splices or a drawing of the same "prior to entering into this contract, that is "not correct."

See Testimony of Hegeman, page 363, fol. 1088.

The uncertainty of Mr. Whittemore, and his unwillingness to testify positively, leaves the preponderance of evidence in favor of the plaintiff upon this point, while the affirmative is upon the defendant.

It is not extremely important whether the plan was exhibited or not.

Mr. Whittemore testified actually that there was nothing on the plan that would indicate anything but a washer.

See Testimony of Whittemore, page 304, folio 912.

The Court will recognize the fact that a washer is a small piece of iron, which in use exactly resembles a nut lock. It is not, as the nut lock; a patented article, and can be furnished at slight cost.

Mr. Whittemore afterwards stated that he showed Mr. Hegeman, prior to the making of the contract, a full size joint with nut locks on it.

Testimony of Whittemore, page 310, folio 928.

Mr. Hegeman says positively that Mr. Whittemore is mistaken. That Mr. Whittemore never showed him any splice with nut locks on it.

He says as follows:

"I was introduced to Mr. J. T. Clark, General Superintendent, to whom I said that I had been referred to him because we were to build the Kansas City line, and his splice was to be used; that I came for information about the splice. He showed me a pair of forged splices. (By forged I mean hand-made splices.) And my inquiry was as to their weight, which was given by Mr. Clark. That was all there was to the conference.

"By a pair of splices I mean splices on each side of the rail; the inside and outside splice on one joint. They were not set up; they were loose. They did not have any nut locks on them. I did not see any nut locks, nor were they shown to me prior to making the contract. Mr. Whittemore did not go with me and show me anything of the kind—the J. T. Clark splice and nut locks put up. I do not think that he went with me to Mr. Clark at all. I never saw the plan that was offered here showing the nut locks and splices—not until it was offered in this case. I never saw it before."

See Testimony of Hegeman, pages 363–364, folios 1089–1090.

Mr. Whittemore states positively that at the interview with Mr. Clark, of which he is not absolutely sure, nothing was said about nut locks.

His testimony is as follows:

"I can't say that the Verona nut lock was mentioned, or that any nut lock was mentioned. I think there were two pair of splices that were shown to him on my table upstairs. I remember that I went down to Superintendent Clark's office with Mr. Hegeman. His attention was called to the top joint, but not especially to the nut locks, not especially to a bolt or a nut."

See Testimony of Whittemore, page 311, folio 933.

Mr. Hegeman says that Mr. Clark showed him a splice not set up. The inside and outside splices on one joint. This splice was not set up and did not have any nut-locks on them.

See Testimony of Hegeman, page 363, fol. 1089.

Mr. Hegeman also says that he never saw a joint set up.

Page 3[illegible], fol, 1090.

Mr. J. T. Clark, the defendant's superintendent, is not called.

It is insisted by the plaintiff—

1st. That what happened prior to the contract is merged in the contract.

2d. That there is not enough in the testimony to put the plaintiff upon notice that he was to furnish any patented article other than the J. T. Clark splice.

The nut lock was in no sense a part of the article afterwards patented and known as J. T. Clark splice patent. But the Verona National nut lock was an entirely distinct patent which was at times used in connection with the J. T. Clark splice.

3d. That the nut lock, as exhibited, could not be distinguished from a washer.

4th. That not a word was spoken at the time of the exhibit as to the requirement of this patented nut lock.

It was established by a preponderance of evidence that the nut lock is no part of the splice.

It is true, that Mr. Whittemore endeavored to establish such a theory.

See Testimony Whittemore, page 304.

His testimony was distinctly negatived by the defendant's other witnesses.

Mr. Frederick A. Delano says nut locks are not part of the splice, but part of the joint.

Testimony of Delano, p. 421, fol. 1261.

Mr. Lewis T. Moore says nut locks are not part of the splice nor part of the bolt; it is part of the joint. Considers nuts and bolts one thing.

See Testimony of Moore, pp. 426, fol. 1278.

Mr. J. B. Moll testifies nut locks are part of the joint and bolt.

Testimony of Moll, p. 435, fol. 1304.

Mr. Hegeman says that there is no designation under the contract for nut locks.

Testimony Hegeman, p. 245, fol. 734.

This evidence, it is submitted, fully supported the finding of the Referee that the plaintiff was under no obligation to furnish and pay for patented nut locks to be used in the construction of the road.

See Referee's Findings 9, 10, 11 and 12, pp. 112-113.

And that those findings of fact fully supported the conclusion that the plaintiff was not legally indebted to the defendant in any sum whatever therefor.

See Findings 3, 4 and 5, page 118.

Third.—AS TO THE RIGHT OF THE PLAINTIFF TO RECOVER THE VALUE OF TIMBER BELONGING TO HIM TAKEN AND USED BY THE DEFENDANT.

(A). As to the plaintiff's proof.

The ownership, quantity, taking and value are distinctly proved.

Mr. Hegeman says:

"The 97,000 feet B. M. of bridge timber alleged to have been taken and used by the company during the washout south of Chillicothe about June 1st, 1888, charged at $2,425, was used after the completion of the contract. It belonged to Heman Clark. It consisted of square timber of various lengths and sizes stored in the Chillichothe yard of the Railroad Company. It was surplus material left on hand. The Chicago, Milwaukee & St. Paul Railroad Company took possession of and used that material. There were washouts during a big storm in the summer of 1888 and to make temporary repairs this material was taken. There was no objection to the taking of it made by me at that time; 97,000 feet of it was taken. The fair value of it was $25 a thousand feet; the total would be $2,425. No part of that has been paid."

See Testimony of Hegeman, page 246, folios 736–737.

The validity of this claim is further evidenced by the written demand made by Mr. Hegeman upon Mr. Whittemore on March 3d, 1890, for the value of this timber.

See Plaintiff's Exhibit No. 24.

It is as follows:

"MILWAUKEE, March 3d, 1890.

D. J. WHITTEMORE, Esq.,
Chief Engineer.

Dear Sir:

A considerable amount of track stringers, 12x16 square timber of various length, and plank, the last item, I am informed, amounted to about 2,000 feet board measure, upon the completion of the Kansas

City Line, was left in Chillicothe yard, and along the line of the road, the same belonging to the contractor. Oak piling was also left on the line at various points, but I am unable to say definitely how many lineal feet of it there was. At the time of the washout south of Chillicothe, during the summer of 1888, I am informed this material was used by your company. Mr. Van Aiken states that he had an inventory taken and that there was about 196 M of pine timber and more than ten thousand feet of piling.

Will you kindly investigate the matter and credit Mr. Clark's account with the value of such timber and piling as was used.

Yours truly,

W. W. HEGEMAN."

See pp. 246-247.

This evidence is also substantiated by the testimony of the witness House, who testifies that he knows of lumber of that character being in the Chillichote yard under the supervision of Lewis Beese, which was used in the washout near there in the spring of 1888.

Mr. House was in charge of these matters on behalf of the defendant, and his testimony is of great value.

See Testimony House, pages 386-387.

Mr. Hegeman explains in detail that the lumber taken was part of a lot of lumber that the Railroad Company would not purchase at the close of the contract, because it was not up to the standard.

The evidence shows the following :

1st. *The possession of the lumber by the Railroad Company.*

2d. *The amount of lumber actually measured.*

3d. *The value of the lumber.*

4th. *The demand in writing for the lumber.*

The only point claimed to be in dispute is whether it was taken away by the Railroad Company or by Clark.

All the plaintiff's witnesses, including the engineer House, says that it was used and taken away by the Railroad Company.

The defendant's witness, Kuehnle, says that it was taken away by Mr. Clark's foreman, and afterwards limits it to being taken away by a foreman of Mr. Clark, named Clark.

See Testimony Kuehnle, pp. 341–345.

There is no evidence in this case to show that Mr. Kuehnle knew that the man that took it away was a foreman of Mr. Clark, or, if a foreman, authorized by Clark or his representatives to take it away.

It appears uncontradicted that Mr. Clark had no foreman by the name of Clark except his own brother, and that he left the work in 1887 and never returned afterwards.

See testimony Hegeman, p. 362, fol. 1086.

This evidence, it is submitted, fully supported the Referee's finding that the defendant converted to its own use 97,000 feet of timber in the yard of the defendant at Chillicothe belonging to the plaintiff of the value of $2,425.

See Referee's 19th, 20th, 21st and 22d Findings, p. 117.

And that the facts so found supported his conclusion that the plaintiff was entitled to recover the sum of $2,425 from the defendant.

See Referee's 6th Finding, page 118.

Point VII.

There was no error committed in allowing the plaintiff to amend his complaint as to the fifth cause of action.

This question is sought to be raised by the seventeenth assignment of error.

See Record, p. 482.

It is, of course, claimed that the amendment of the complaint is not a question open to review by this Court, but even if it were, there can be no doubt but that the amendment was properly allowed.

1st. By reason of the consent and stipulation of the defendant's counsel.

2d. By reason of the rule of law that amendments should be allowed in furtherance of justice.

First.—On the hearing of this case before the Referee, the defendant found it necessary to amend its answer. This amendment was allowed by the Referee upon the agreement of the defendant that the plaintiff should have the privilege "to amend as he may be advised before the opening of de-

fendant's case, to which counsel for defendant agrees."

See Record, p. 232, fol. 694.

Second.—Amendments are allowed by the courts in the furtherance of justice.

A liberal rule prevails in the courts as to amendments.

Bamberger *v.* Terry, 103 U. S., 40.
Deyo *v.* Morss, 144 N. Y., 216.

In the case at bar, the amendment did not include an additional claim, but simply a change in the form in which the claim had been pleaded.

Under the authorities as well as the defendants consent, the amendment was fully authorized.

Point VIII.

None of the other assignments of error raises any question which is open to review by this Court.

The first, second, third, sixth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth assignments of error raise simply questions as to the denial of the motion for a new trial before Judge Brown under the rule in the Southern District of New York allowing such motions to be made, which motion was addressed solely to the discretion of the Trial Court and is not reviewable by writ of error.

This is so whether the motion was to set aside a special finding, which is in effect a motion for a

new trial, or whether it was in arrest of judgment, or for a new trial.

Berry *v.* Seawall, 65 Fed. Rep., 742.
Criner *v.* Mathew, 67 Fed. Rep., 945.
Woodbury *v.* City of Shawneetown, 74 Fed. Rep., 205.

The fourth, fifth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth, fortieth, forty first, forty-second, forty-third, forty fourth, forty-fifth, forty-sixth, forty-seventh, forty-eighth, forty-ninth, fiftieth, fifty-first, fifty-second, fifty-third, fifty-fourth, fifty-fifty, fifty-sixth, fifty-seventh, fifty-eighth, fifty ninth, sixtieth, sixty-first, sixty-second, sixty-third, sixty-fourth, sixty-fifth, sixty-sixth, sixty-seventh, sixty-eighth, sixty-ninth, seventieth, seventy-first, seventy-second, seventy-third, seventy-fourth, seventy-fifth, seventy-sixth and seventy-seventh, seek simply either to raise questions as to the proceedings had at the trial, or to the findings of fact, or the refusals to find facts as requested, and under the repeated decisions of this Court, open no question for review in the appellate court.

Shipman *v.* Straitsville Central Mining Co., 158 U. S., 356.
Shipman *v.* Ohio Coal Exchange, 70 Fed. Rep., 652.

It is, therefore, respectfully submitted that the plaintiff is entitled to recover the amount allowed by the Referee.

1st. BECAUSE THE FINDINGS OF THE REFEREE FULLY SUPPORT THE CONCLUSIONS ARRIVED AT BY HIM IN HIS REPORT, AND THE EVIDENCE FULLY SUPPORTS THE FINDINGS OF FACT.

2d. BECAUSE THE DEFENSES SET UP BY THE DEFENDANT BASED ON THE RECEIPT AS PAYMENT, ACCORD, AND SATISFACTION AND ACCOUNT STATED AS A BAR TO THE PLAINTIFF'S RECOVERY, ARE WHOLLY UNTENABLE AND WITHOUT MERIT.

Point IX.

The judgment should be affirmed, with costs.

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CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* CLARK.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 256. Argued April 20, 23, 1900. — Decided May 28, 1900.

The record shows that the cause came on for trial without a jury, a trial by jury having been expressly waived by written consent of the parties, that a referee was duly appointed by similar consent, in accordance with the rules and customs of the District in which the trial was had, and that his findings, rulings and decisions were made those of the court. *Held*, that the question whether the judgment rendered was warranted by the facts found was open for consideration in the Circuit Court of Appeals, and is so here.

Clark contracted with the railway company for the construction of part of its road. He also contracted for the completion of his work on a day named. It was not completed till some time after that day. Clark contended that the failure was caused by the neglect of the company to procure a right of way. When the time for settlement came there were also other disputes between him and the company, which are set forth in detail in the statement of facts. The result was that Clark signed a paper in which, after stating the disputed claims in detail, it was said: "Now therefore be it known that I, the said Heman Clark, have received of and from the said Chicago, Milwaukee and St. Paul Railway Company, the sum of one hundred and seventy three thousand, five hundred and thirty

Statement of the Case.

two and $\frac{42}{100}$ dollars, in full satisfaction of the amount due me on said estimates, and in full satisfaction of all claims and demands of every kind, name and nature, arising from or growing out of said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of said railway company to account for said forty thousand dollars, as herein provided." This paper after signature was given by him to the railway company, and in return they gave him a check for the balance named. Five years and more after this transaction this action was brought to recover the disputed claims. *Held*, that Clark was barred by his release from recovering the disputed sums.

The rule laid down in *Cumber* v. *Wane*, 1 Strange, 426, that where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such for want of consideration, has been much questioned and qualified, and is considered so far with disfavor, as to be confined strictly to cases within it.

HEMAN Clark constructed some two hundred miles of railroad in the States of Iowa and Missouri, for the Chicago, Milwaukee and St. Paul Railway Company, under a written contract dated March 6, 1886, which is set forth in the findings hereafter referred to. During the period of construction the company paid Clark large sums of money on account. After the road was completed the Chief Engineer of the company, as was his duty under the contract, certified to the total amount that Clark had earned under the contract. This amount was $3,895,798.79. But Clark claimed also the further sum of $34,598.90 for material sold by him to the company, and certain rebates and other matters of that description, which would make the aggregate $3,930,397.69. As to the amount that should be credited to the company, the company claimed credits to the amount of $3,716,865.20, while Clark contended that the total amount that should be credited was $3,667,306.59, or $49,558.63 less than the amount claimed by the company. This latter amount was made up of two items: one of $40,000, for overtime forfeiture or penalty, and the other of $9558.63, the amount paid by the company for nut locks furnished to Clark, and used by him in the construction of the road. The company prepared an account stated, which allowed the $34,598.90, on one side of the account, and included the $40,000 and the $9558.63, on the other, and appended to it a release for Clark to sign, if he accepted the balance therein stated. The account

stated and release were sent to him with notice that upon signing and returning the same to the Vice President of the company, a check for the balance shown by the account to be due would be sent to him. Immediately thereupon, on March 9, 1888, the account and release were returned by Clark to the Vice President, signed and witnessed, and a check for the full amount of such balance, $173,532.29, was at once delivered to Clark, who indorsed and deposited it in his bank, and received the proceeds thereof.

August 5, 1893, Clark commenced this action against the railroad company to recover amounts which he claimed to be due him on account of the construction of the road, and for extra work and other claims growing out of the contract. The complaint originally contained three causes of action, but by amendment the number was increased to six. The second, third, fourth and sixth causes of action, and part of the first cause, were eliminated from the case by the judgment, and Clark recovered on the two items of $40,000 and $9558.63 under the first cause of action, and also under the fifth cause for $2425, a matter arising subsequent to the release, and not included within it.

The action was originally brought in the state court, but was removed on the application of the company to the Circuit Court of the United States for the Southern District of New York. After issue was joined, the cause came on for trial at a regular term of the Circuit Court. Trial by jury was waived by written consent of the parties, filed with the clerk, and the cause was referred to a referee, who in due time made his report and findings. The court adopted the findings of the referee and ordered judgment thereon for the sum of $80,479.35. This judgment was subsequently affirmed by the Circuit Court of Appeals. 92 Fed. Rep. 968.

The findings of fact and conclusions of law of the referee were as follows:

"Findings of Fact.

"1. That in the month of March, 1886, the defendant, the Chicago, Milwaukee and St. Paul Railway Company, made and entered into a contract in writing with the plaintiff, dated the

6th day of March, 1886, for the construction of a line of railroad from a point in the city of Ottumwa, Iowa, to a place called Harlem Station, in the State of Missouri, a distance of about 202.8 miles, to be completed on the first day of August, 1887, a copy of which contract is hereto annexed, marked 'A.'

"2. That immediately after the execution of the said contract the plaintiff proceeded to carry out and perform the same, and did carry out and perform the same, except a portion thereof otherwise agreed between the parties, and substantially completed the same on or about the 1st day of November, 1887, and the same was duly accepted by the defendant on or about the first day of March, 1888.

"3. That on or about the third day of March, 1888, the Chief Engineer in charge of said work under said contract made a final certificate and estimate, which is copied in full in the twentieth and twenty-first finding of fact last asked by the defendant, and by this reference is made part hereof.

"4. That said certificate and estimate were delivered to the defendant, but were never delivered to the plaintiff or any of his agents, and were not seen by the plaintiff or any of his agents or brought to his knowledge otherwise than by the reference thereto in the receipt of March 9, 1888, hereinafter referred to, until the trial of this action.

"5. That the consideration for the performance of said contract originally mentioned in said contract was $3,914,600, but before the execution of said contract by the plaintiff, by and with the consent of the defendant, the consideration was changed and made $3,954,600.

"6. That the plaintiff made and entered into a supplemental contract whereby he agreed with the defendant to complete his performance of said contract on or before June 1, 1887, and to allow the said defendant, by way of forfeiture, in case the said railway were not so completed by the 1st of June, 1887, the sum of $40,000.

"7. That the defendant failed to furnish the plaintiff with rights of way as by said contract it had agreed to do in time to enable the plaintiff to complete his contract prior to the 1st of June, 1887, or prior to the 1st of August, 1887, but on the con-

trary, delayed the plaintiff in the performance of said contract at a point upon the said road known as Minneville until October 27, 1887, by reason of the neglect, failure and omission of the defendant to obtain the necessary right of way at said point so as to permit the construction of the road and completion of the contract at said point.

"8. That the plaintiff was thereby prevented from completing his contract on or prior to August 1, 1887, and also on or prior to June 1, 1887, by the negligence, omission and fault of the defendant.

"9. That during the progress of the work the defendant purchased and furnished to the plaintiff and charged him for patented nut locks, for which the defendant paid $9558.63.

"10. That the said nut locks so furnished by the defendant were used by the plaintiff in the construction of the road.

"11. That there are no provisions in the contract which require that the plaintiff, and the plaintiff never agreed, that he should use in the construction of the railroad under said contract, any patented nut locks.

"12. That the plaintiff was ordered by the defendant to put such nut locks on the road at the beginning of the work. That he protested against their use, and finally yielded and used them in track laying upon the promise that the matter of the charge for said nut locks should be adjusted after the completion of the contract.

"13. That upon the 9th day of March, 1888, the plaintiff signed and caused to be delivered to a representative of the defendant a paper, writing or receipt presented to him by the defendant for signature, of which the following is a copy; and upon the signature thereof by said Clark, and its delivery by him to the defendant, the plaintiff was paid by the said defendant the said sum named therein of $213,532.49, less the sum of $40,000 claimed in said paper to be retained for forfeiture in not completing performance of his work under said contract on or prior to June 1, 1887, and the sum of $3,626,865.20 included therein embraces said sum of $9558.63 claimed by defendant to be due for nut locks. Said $40,000 was deducted, and the actual amount so paid was $173,532.49.

"Whereas, a final estimate has been made by D. J. Whittemore, Chief Engineer of the Chicago, Milwaukee and St. Paul Railway Company, of all the work done and material furnished under the contract made between said railway company and Heman Clark, bearing date March 8, 1886, for the construction of the railroad from Ottumwa, in Iowa, to the Missouri River, including all extra work performed and material furnished of every kind and description, which estimate, with the prior monthly estimates, less deductions made for work not done and work assumed by said company, amounts to $3,895,798.79;

"And whereas, the further sum of $34,598.90 should be credited to said Clark for materials sold by him to said company, and certain rebates and other matters of that description, making, with the amount of said estimates, the sum of $3,930,397.69;

"And whereas, the said Chicago, Milwaukee and St. Paul Railway Company has paid the said Clark to apply on said contract, in money, material, labor and transportation, the sum of $3,626,865.20;

"And whereas, by the terms of section 4, article 13, of said contract, said Clark was to be charged in addition for transportation the sum of $50,000;

"And by a supplemental contract was to allow the said railway company, by way of forfeiture in case said railway was not completed by the first day of June, 1887, the further sum of $40,000;

"Making the amount paid on said contract, together with the allowance of said transportation and the allowance of said forfeiture, the sum of $3,716,865.20;

"Leaving the amount still due said Clark on said contract, the sum of $213,532.49;

"And, whereas, in and by said contract it was provided that the said Heman Clark, party of the first part, should save the said railway company free and harmless from all claims that might be made against said railway company for liens of workmen and claims of sub-contractors, and from all damages arising from not keeping sufficient fences to preserve crops and restrain cattle, and from all damages for cattle or other domestic

animals killed or injured, and from all damages suffered by said sub-contractors and employés while engaged upon said work, of which said class of claims, about $40,000 in amount, have been made upon and are now pending in courts by divers claimants against said railway company, and the sum of $40,000 of the amount so due, as aforesaid, under said contract to the said Heman Clark, has been reserved and set aside by said railway company, as indemnity or security for the payment of said claims and of such other claims of the same class as hereafter may be made, in case said claimants, or any of them, recover judgments against said railway company, and the said $40,000, or the balance thereof, after paying and settling such claims as may be established against said railway company, is to be paid over to the said Heman Clark as soon as said claims are satisfied or said railway company suitably indemnified from any loss on account of the same, which $40,000 deducted from the sum of $213,532.49, so, as aforesaid, due said Clark, leaves due and owing by said railway company and now payable on said contract to said Heman Clark, the sum of $173,532.49:

"'Now, therefore, be it known, that I, the said Heman Clark, have received of and from the said Chicago, Milwaukee and St. Paul Railway Company the sum of one hundred and seventy-three thousand five hundred and thirty-two and $\frac{49}{100}$ dollars ($173,532.49), in full satisfaction of the amount due me on said estimates, and in full satisfaction of all claims and demands of every kind, name and nature, arising from, or growing out of, said contract of March 6, 1886, and of the construction of said railroad, excepting the obligation of said railway company to account for said forty thousand dollars, as hereinbefore provided.

"'HEMAN CLARK.

"'WM. C. EDWARDS.'

"14. That said receipt and paper contained an accurate, truthful and undisputed account of all dealings between said parties except in the matter of the $40,000 deducted for time forfeiture, the $9558.63 for nut locks embraced in the $3,626,865.20, and the lumber hereinafter referred to, and herein valued at

$2425. Besides the above, the defendant has paid the $40,000 reserved as indemnity or security for the payment of claims against Clark, and in addition thereto upon like accounts, the sum of $521.75.

"15. That at the time of the signing and delivery of said last-mentioned paper the final certificate or estimate of the Chief Engineer under the contract had not been delivered to the plaintiff or any of his agents by the defendant or the said Engineer, and the contents thereof were not known to the plaintiff, other than by the reference thereto contained in said receipt of March 9, 1888.

"16. That no other final settlement of the accounts under said contract had been had between the plaintiff and the defendant at the time that the last-mentioned paper was signed and delivered.

"17. That at the time of the signing and delivery of said last-mentioned paper, the question of the liability of the plaintiff for nut locks, which had been left by the parties to this action open for settlement and adjustment until after the completion of the work under said contract, and had been referred by the defendant to the Chief Engineer under the said contract; had not been passed upon by him; that the said Chief Engineer had referred the question for the opinion of the defendant's counsel, who had not at said time given his opinion in relation thereto.

"18. That no account was ever, otherwise than by said paper and the receipt of said money, stated of the transactions under and connnected with said contract between the plaintiff and the defendant.

"19. That, in or about the months of March and April, 1888, the plaintiff was the owner of 97,000 feet B. M. bridge timber then in the yard of the defendant at Chillicothe and along the line of the railroad.

"20. That the said lumber did not conform to the standard of the defendant, and was not purchased by the defendant from the plaintiff, or allowed in the final certificate of the Chief Engineer, under the contract in this section to the plaintiff.

"21. That, in and about the month of June, 1888, the de-

fendant took possession of the said lumber and converted the same to their own use without assent or knowledge of the plaintiff.

"22. That the value of the said lumber at the time of the taking, in June, 1888, was $2425."

"Conclusions of Law.

"1. That the defendant is not entitled to charge the plaintiff, or to retain and deduct from the amount earned and payable to the plaintiff under the said contract the sum of $40,000 as a forfeiture or liquidated damages for not completing the contract upon June 1, 1887.

"2. That under the facts proved in this case, the plaintiff is not legally liable to the defendant for any damages for failure to complete the contract within the contract time or the time agreed upon, for the reason that the plaintiff was prevented by the negligence of the defendant and its omission to procure the necessary right of way, from completing the said work in such time.

"3. That the plaintiff is not liable to the defendant for the sum of $9558.63, the cost of patent nut locks furnished by the defendant to the plaintiff and used by him in the performance of the said contract.

"4. That there was no obligation imposed by the contract upon the plaintiff to furnish and pay for patent nut locks to be used in the construction of the said road.

"5. That the plaintiff is not legally indebted to the defendant in any sum whatever for patent nut locks furnished by the defendant and used in the construction of the railroad under said contract.

"6. That the plaintiff is entitled to recover from the defendant the sum of $2425, with interest from June 1, 1888, for the conversion by the defendant of lumber belonging to the plaintiff.

"7. That the signing and delivery by the plaintiff of the receipt on or about the 9th day of March, 1888, and the acceptance of the check of $173,532.49, under the facts and circumstances proved in this case were, as to the two sums of $9558.63, charged for nut locks, and $40,000 charged by way of forfeiture for non-

performance in time, wholly without consideration, and in violation of the contract between the parties, and do not constitute any bar to the recovery of the plaintiff for the sums of $9558.63 and $40,000 otherwise as due under the contract.

"8. That the signing and delivery of said receipt, and the acceptance of the check thereunder, do not constitute a legal payment or accord and satisfaction of the said sums of $9558.63 and $40,000, or either of them, or any part or either of them.

"9. That no account of the transactions under this contract, and of the claims sued on in this action, was ever had or stated between the parties to this action, otherwise than by said receipt or paper of March 9, 1888.

"10. That the plaintiff is entitled to recover the amount certified by the Chief Engineer of $3,895,793.79 without the deduction claimed by the defendants for nut locks of $9558.63, and without allowance to the defendant by way of forfeiture for non-completion of the railway on the 1st day of June, 1887, said sums together amounting to $49,558.63 with interest from March 9, 1888, and is also entitled to recover for timber used by the defendant on the 30th day of June, 1888, to the amount of $2425 with interest from June 30, 1888, the whole amounting at the date of this report, viz., the 4th day of December, 1897, to the sum of $81,305.88, for which with interest from this date and disbursements the plaintiff is entitled to judgment, less amount paid by the defendant in excess of the reserved $40,000, $521.75, with interest from and to the same date, being in all this day $826.53.

"There will be judgment, therefore, for the plaintiff for $80,479.35 with interest and costs, interest to be computed from December 4, 1897."

In addition to the foregoing findings of fact, twenty-seven additional findings of fact were made at the request of defendant. They related to, or set forth, the execution of the contract for the construction of the road; a supplemental agreement by which the sum of $40,000 was to be deducted from the contract price if the road was not completed by June 1, 1887; the failure of Clark to complete the road in that time; the final estimate and certificate of the Chief Engineer of the company;

Counsel for Parties.

the sending of the statement of account and release to Clark, with the information that, on the same being signed and returned by him, a check for the balance due him, $173,549, would be sent to him; the return of said statement and release signed by Clark, and the sending to him of a check for such balance, March 9, 1888; the deposit by Clark of said check and his retention of the amount paid him thereon; the expenditure of the $40,000, (and the $521.75 besides,) reserved by the company, with Clark's consent, at the time of the settlement, to meet unpaid claims against Clark, incurred in the construction of the road; the furnishing of nut locks to Clark by the company for the construction of the road; and that the company did not require Clark to furnish any material or perform the work of furnishing or erecting any structures of a more expensive design than required of him by the contract for the construction of the road, otherwise than as set forth in the final estimate of the Chief Engineer.

Amendments to the complaint were allowed by the referee over defendant's objection and exception, and approved by the court under like objection and exception.

The errors assigned were that: (1) The court below erred in holding that the findings of fact supported the judgment as to the item of $9558.63 for nut locks, and the item of $40,000 for time forfeiture; (2) the court below erred in holding that there was no consideration for the settlement made by the parties as to the items of $9558.63 for nut locks, and $40,000 for time forfeiture; (3) the court below erred in holding that the question whether there was any evidence in the record to sustain the finding that the defendant in June, 1888, wrongfully took possession of certain lumber and converted it to its own use was not reviewable; (4) the court below erred in holding that it was proper to allow plaintiff to amend his complaint on the trial against defendant's objection, by adding thereto an action sounding in tort and to recover thereon.

Mr. Burton Hanson for the Railway Company. *Mr. George R. Peck* was on his brief.

Mr. L. Laflin Kellogg for Clark. *Mr. Alfred C. Petté* was on his brief.

Opinion of the Court.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

The record shows that the cause came on before the District Judge, holding the Circuit Court, for trial, "without a jury, and a trial by jury having been expressly waived by the written consent of the parties duly filed;" that a referee was appointed by written consent in accordance with the modes of procedure in such cases in the courts of record of New York, and with the rules of the Circuit Court; and that his findings, rulings and decisions were made those of the court. Under these circumstances the question whether the judgment rendered was warranted by the facts found was open for consideration in the Circuit Court of Appeals, and is so here, and that is sufficient for the disposition of the case. *Shipman* v. *Mining Company*, 158 U. S. 356.

By the writing executed and delivered by him, March 9, 1888, Clark acknowledged the receipt of $173,532.49 "in full satisfaction of the amount due me on such estimates, and in full satisfaction of all claims and demands of every kind, name and nature, arising from, or growing out of such contract of March 6, 1886, and of the construction of said railroad," excepting an item not material here. Five years and nearly five months after the receipt of the money and the execution and delivery of the discharge, this action was instituted. There was no finding or contention that the settlement was procured by fraud, or duress, or was the result of mutual mistake; nor was there any finding that Clark did not have full knowledge of all the facts at the time he signed and delivered the release, and the presumption was that he had such knowledge. But the proposition is that the release was given without consideration, and that Clark was entitled to recover so far as the items of $40,000 and $9558.63 were concerned, on the principle that where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such for want of consideration. *Cumber* v. *Wane*, 1 Strange, 426. The rule therein laid down has been much questioned and qualified. *Goddard* v. *O'Brien*, 9 Q. B. Div. 37;

Sibree v. *Tripp*, 15 M. & W. 23; *Couldery* v. *Bartrum*, 19 Ch. D. 394; *Foakes* v. *Beer*, 9 App. Cas. 605; Notes to *Cumber* v. *Wane* in Smith's Leading Cases, vol. 1, 606; 12 Harvard Law Review, 521.

The result of the modern cases is that the rule only applies when the larger sum is liquidated, and when there is no consideration whatever for the surrender of part of it; and while the general rule must be regarded as well settled, it is considered so far with disfavor as to be confined strictly to cases within it.

In *Johnston* v. *Brannan*, 5 Johns. 268, 271, it was referred to as "that rigid and rather unreasonable rule of the old law;" and in *Kellogg* v. *Richards*, 14 Wend. 116, where the acceptance of a promissory note of a third party for a less sum was held to be a good accord and satisfaction, Mr. Justice Nelson, then a member of the Supreme Court of New York, said: "It is true there does not seem to be much, if any, ground for distinction, between such a case and one where a less sum of money is paid and agreed to be accepted in full, which would not be a good plea. . . . The rule that the payment of a less sum of money, though agreed by the plaintiff to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical, and not very well supported by reason. Courts therefore have departed from it upon slight distinctions."

So in *Brooks* v. *White*, 2 Metcalf, 283, the Supreme Judicial Court of Massachusetts said that: "The foundation of the rule seems therefore to be, that in the case of the acceptance of a less sum of money in discharge of a debt, inasmuch as there is no new consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate, with legal impunity, his promise to his debtor, however freely and understandingly made. This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import; and whenever a technical reason for its application does not exist, the rule itself is not to be applied. Hence judges have been disposed to take out of its application all those cases where there was any new consideration, or any collateral bene-

fit received by the payee, which might raise a technical legal consideration, although it was quite apparent that such consideration was far less than the amount of the sum due."

To same effect, Ranney, J., in *Harper* v. *Graham*, 20 Ohio, 105; *Jaffray* v. *Davis*, 124 N. Y. 164; *Smith* v. *Ballou*, 1 R. I. 496; *Mitchell* v. *Wheaton*, 46 Conn. 315; *Seymour* v. *Goodrich*, 80 Va. 303.

In some of the States the contrary rule has been established by statute. Ala. Code, § 2774, c. 10; Cal. Civ. Code, § 1524; Georgia Code, § 3735; Maine Rev. Stat. c. 82, § 45; N. Car. Code, § 574, c. 7, art. 5; Tenn. Code, 1884, § 4539, c. 3, art. 4; Va. Code, 1887, c. 134; *Weymouth* v. *Babcock*, 42 Maine, 42; *Memphis* v. *Brown*, 1 Flippin, 188; *McArthur* v. *Dane*, 61 Ala. 539.

The findings of fact bearing on the items of $40,000 for forfeiture, and $9558.63 for nut locks, exclude any other inference than that there was a dispute between the parties in respect to those items as to the facts on which the claim for their allowance was based. This being so, it is insisted that the total balance of $223,091.02, (as it would have been if $9558.63 had not been deducted,) cannot be held to have been liquidated as a whole, that is, agreed upon by the parties or fixed by operation of law, and that the contention cannot be sustained that where there is a dispute as to an aggregate amount due, and the debtor offers to pay so much thereof as he concedes to be correct, and the creditor accepts, is paid and releases, nevertheless the creditor can afterward assert the disputed part of his claim on the ground that he has only received what was undeniably due him.

In *United States* v. *Bostwick*, 94 U. S. 53, 67, it was said that: "Payment by a debtor of a part of his debt is not a satisfaction of the whole except it be made and accepted on some new consideration;" while in *Baird* v. *United States*, 96 U. S. 430, it was held that if the debt be unliquidated and the amount uncertain, this rule does not apply. "In such cases the question is whether the payment was in fact made and accepted in satisfaction."

In *Fire Insurance Association* v. *Wickham*, 141 U. S. 564, 577, Mr. Justice Brown stated the doctrine thus: "The rule is

well established that where the facts show clearly a certain sum to be due from one person to another, the release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a *bona fide* dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

In this case it cannot be said that at the time the release was executed there was no good reason to doubt that these items were open to dispute. The good faith of the company in claiming their allowance is not impugned, and as Judge Lacombe said: "Both items were legitimate matters of dispute, and unless settled by agreement of parties, might fairly be brought by either party into court."

And the cases are many in which it has been held that where an aggregate amount is in dispute, the payment of a specified sum conceded to be due, that is, by including certain items but excluding disputed items, on condition that the sum so paid shall be received in full satisfaction, will be sustained as an extinguishment of the whole.

In *Fuller* v. *Kemp*, 138 N. Y. 231, where certain items of an account were disputed, and certain items were undisputed, and defendant paid plaintiff only the amount of the undisputed items, the court held that the dispute over certain of the items made the account an unliquidated one, and that plaintiff, by accepting the amount of the undisputed items with notice that it was sent as payment in full, was precluded from recovering the balance of his demand.

Nassoiy v. *Tomlinson*, 148 N. Y. 326, 330, is to the same effect, and the court said: "A demand is not liquidated even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper

amount, the demand is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction."

In *Ostrander* v. *Scott*, 161 Ill. 339, plaintiff had an account against defendant amounting to $5282.58, the items of which were not in dispute, but defendant claimed that he was entitled to be allowed the sum of $1210 for commissions, and accordingly he sent his check for the difference to plaintiff, at the same time notifying him that it was sent in settlement of his account in full, and if not accepted as such to return it. The check was retained by plaintiff, and he afterwards brought suit against defendant to recover the amount withheld, but the Supreme Court of Illinois held that there could be no recovery, and that an account cannot be considered as liquidated, so as to prevent the receipt of a less amount as payment from operating as a satisfaction, where there is a controversy over a set-off and the amount of the balance.

In *Tanner* v. *Merrill*, 108 Mich. 58, plaintiff sought to recover a sum which had been deducted from his wages by defendants, his employers. The amount of his wages was not disputed, but the right to make any deduction was questioned. Plaintiff received the amount of his wages less the deduction, and gave a receipt in full, and afterwards brought suit to recover the balance on the ground that, having only received the amount admitted to be due, there was no consideration for the release as to that which was disputed. The Supreme Court of Michigan held that the plaintiff could not recover, and that the rule that a receipt of part payment to be effective in the discharge of the entire debt must be rested upon a valid consideration, is limited to cases where the debt is liquidated by agreement or otherwise; that a claim any portion of which is in dispute cannot be considered to be liquidated within the meaning of the rule; and that a receipt in full, given upon payment of the undisputed part of the claim, after a refusal to pay another part which is disputed, is conclusive as against the right of the creditor to recover a further sum, in the absence of mistake, fraud, duress or undue influence.

Without analyzing the cases, it should be added that it has

been frequently ruled by this court that a receipt in full must be regarded as an acquittance in bar of any further demand in the absence of any allegation and evidence that it was given in ignorance of its purport, or in circumstances constituting duress, fraud or mistake. *De Arnaud* v. *United States*, 151 U. S. 483; *United States* v. *Garlinger*, 169 U. S. 316, 322; *United States* v. *Adams*, 7 Wall. 463; *United States* v. *Child*, 12 Wall. 232; *United States* v. *Justice*, 14 Wall. 535; *Baker* v. *Nachtrieb*, 19 How. 126.

The general principle applicable to settlements was thus expressed by Mr. Justice Clifford, in *Hagar* v. *Thomson*, 1 Black, 80, 93: "Much the largest number of controversies between business men are ultimately settled by the parties themselves; and when there is no unfairness, and all the facts are equally known to both sides, an adjustment by them is final and conclusive. Oftentimes a party may be willing to yield something for the sake of a settlement; and if he does so with a full knowledge of the circumstances, he cannot affirm the settlement, and afterwards maintain a suit for that which he voluntarily surrendered."

But apart from the controversy over the two items of $40,000 and $9558.63, which was composed by the release, there was an item of $34,558.90 credited to Clark in the final account, the allowance of which, the company contends, furnished ample consideration therefor, although the adequacy of the consideration is not, in such cases, open to inquiry.

The referee found: "That no other final settlement of the accounts under said contracts had been had between the plaintiff and the defendant at the time the said last-mentioned paper was signed and delivered." "That no account was ever, otherwise than by said paper and the receipt of said money, stated of the transactions under and connected with said contract between the plaintiff and the defendant;" and also as a conclusion: "That no account of the transactions under this contract, and of the claims sued on in this action, was ever had or stated between the parties to this action, otherwise than by said receipt or paper of March 9, 1888." The release in question allowed to Clark, that is, debited the company with, the sum of $34,598.90,

"for materials sold by him to said company, and certain rebates and matters of that description;" and charged Clark, that is, credited the company, with $40,000 by way of forfeiture, and $9558.63 for nut locks. It was in this respect, in effect, a statement of cross-demands. The $40,000 was specifically described and the $9558.63 was included in the total credits stated.

That this contractor, carrying on the work of building two hundred miles of railroad, and receiving payments on vouchers from time to time, must have been aware from his own books and papers that the $9558.63 was thus included, can hardly be reasonably denied, especially as he had objected to being charged with it. Indeed we do not understand that there is any suggestion that Clark was ignorant of any part of the account.

As to the $34,558.90, it appears from the contract, and final certificate and estimate, which are set forth in the principal or additional findings, that this item represented no part of the work specified under the contract, nor extra work, nor materials ordered by the company, and that it was not included in the contract or in the certificate and final estimate.

As was said by Lacombe, J., who delivered the principal opinion below: "Indeed it is plain to a demonstration from the findings, that the item in question was not included either in the original contract or in the extra work, and must represent an additional and independent contract of sale." And the learned judge further said: "From what has been said before, it is plain that, if at the time of the transactions relied upon as showing an accord and satisfaction, this sum of $34,598.90 so allowed to claimant represented an unliquidated item, the amount of which he would have to establish by evidence in case he had sued to recover it, its allowance to him upon the settlement of March 9, 1888, would be a sufficient consideration to uphold that settlement against him as an accord and satisfaction of all his claims." There was no finding that this amount had ever been agreed upon or liquidated by the parties in a manner that would have entitled Clark to have recovered the amount from the company as an independent item, otherwise than by the statement of it in the account preceding, and which formed a part of the receipt and acknowledgment of satisfac-

tion which Clark executed and delivered to the company March 9, 1888. Nor was there any finding showing, or tending to show, that the company would have placed that sum to Clark's credit except as an item in an account which credited the company with the two charges for nut locks and forfeiture.

But the Circuit Court of Appeals held that because of the fourteenth finding of fact, it must be assumed that the referee was satisfied from the testimony, though he did not so find in terms, that the prior transactions between the parties were such that this sum of $34,558.90 was as much liquidated as was the sum of $3,895,798.79, to which the Chief Engineer had certified. Judge Lacombe said, referring to this particular item and to the fourteenth finding of fact: "By what process it was so liquidated does not appear in the findings. We must take his finding, therefore, as conclusive upon the question, and assume that either by an agreement for price in advance, or subsequently by entering into some binding agreement as to the sum to be paid, the defendant had lost the right to throw the plaintiff into court as to that item."

The fourteenth finding of fact was "that said receipt and paper contain a correct, truthful and undisputed account of all dealings between said parties except in the matter of the $40,000 deducted for time forfeiture, the $9558.63 for nut locks embraced in the $3,626,865.20, and the lumber hereinafter referred to, and herein valued at $2425." If this finding means that the statement of account was incorrect, untruthful and disputed as to the two items, it does not affirmatively say so, and if construed as amounting to that, it was not found that Clark did not have full knowledge thereof at the time he received the money and made the settlement. If it means that the statement of account as to these items was disputed, then the contention is a reasonable one that such dispute was a sufficient consideration to support the settlement in its entirety. But we must decline to accept the view that because of this finding it should be assumed, without any finding to that effect, that there had been prior transactions between Clark and the company, by which the item of $34,558.90 was liquidated, for it is explicitly declared by the referee that no account of the transactions

under the contract, and of the claims sued on in this action, was ever had or stated between the parties, otherwise than by the paper of March 9, 1888. The value of the materials, rebates and other matters covered by this item may not have been disputed, but it did not follow that the company was obliged to purchase the materials or to allow the rebates, or that the amount thereof had been previously agreed to; nor that liability therefor might not have been contested if Clark had declined to sign the proposed acknowledgment of satisfaction. We must remember that Clark knew all about the account; he knew what the company claimed, and what he claimed, yet he accepted the check and signed the release without even a protest.

The word "liquidated" is used in different senses, and as applicable here means made certain as to what and how much is due; made certain by agreement of parties or by operation of law. We are of opinion that it would be going altogether too far to treat the fourteenth finding, segregated from the others, as equivalent to a determination that the $34,558.90 had been liquidated independently of the whole account as stated.

And, on the face of the findings, we think the credit in Clark's favor, taken in connection with the credits in the company's favor, put this adjustment beyond the reach of this belated attempt to overhaul it, and that Clark was barred by his release from recovering in this action the $40,000 and the $9558.63, as having been improperly deducted.

As to the sum of $2425, that was the amount of a claim arising after the release was signed, and not included within it. There was some evidence tending to sustain the findings of the referee in support of this item, and we agree with the Circuit Court of Appeals that no error was committed in the matter of amending the complaint, and in holding that a recovery could be had for this amount under the complaint as amended.

The judgment of the Circuit Court of Appeals for the Second Circuit is reversed, with costs; the judgment of the Circuit Court for the Southern District of New York is also reversed, and the cause remanded to the latter court, with a direction to enter judgment in favor of plaintiff and against defendant, for

Syllabus.

$2425, with interest from June 30, 1888, less the sum of $521.78, with interest from the same date; the costs of the Circuit Court of Appeals to be paid by defendant in error therein; and the costs in the Circuit Court to be adjusted as to that court may seem just under the circumstances.

Ordered accordingly.